

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ELCLA E017 OF 2025

GEORGE OMOLLO

OWITI.....APPELLANT VERSUS
MERCY ANYANGO OJEMA.....1ST
RESPONDENT JANE ADHIAMBO

OJEMA.....2ND RESPONDENT RISPER
ADONGO OJEMA.....3RD

RESPONDENT

JUDGMENT

(Being an appeal from the judgment of the Senior Principal Magistrate Hon. Naomi Wairimu (SPM) delivered on the 15th May, 2025 in Migori MCELC No. E093 of 2022)

Introduction

1. This is an Appeal arising from the judgment of Honourable Naomi Wairimu Senior Principal Magistrate, delivered on 15th May, 2025 in Migori MCELC No. E093 of 2022. The Appellant filed a Memorandum of Appeal dated 5th June, 2025, against the said judgment on the following grounds: -

1. THAT the learned Magistrate erred in law by failing to deliver a reasoned judgment that was against the weight of the evidence thereby occasioning a miscarriage of justice against the appellant.

- 2. THAT the learned trial Magistrate erred in law by making a finding that the plaintiffs had proven their case to the required standards when as set out under sections 107, 108 and 109 of the Evidence Act the plaintiffs had not dislodged their burden as stipulated under the aforesaid Act.**
- 3. THAT the learned trial Magistrate erred in law and fact when she made a finding that the Land known as Kanyamkano/Kamgundo/1130 which was acquired immediately after succession and transferred to the defendant/appellant was matrimonial property contrary to dictates of the Matrimonial Property Act.**
- 4. THAT in clear contravention of the Marriage Act and the precedent cited by the learned trial Magistrate in her own judgment, the trial court erred in law and fact when she made a finding that the plaintiffs had met the legal threshold of proof of a marriage under customary law notwithstanding that no evidence was led to that effect.**

5. THAT the learned trial Magistrate erred in law when she overlooked the High Court's holding in Nakuru ELC No. 443 of 2016, E.K.N VS A.S. & 2 others where the legal principle that spousal consent is not mandatory in the disposition of Land where the vendor is in a polygamous marriage.

6. THAT the learned trial Magistrate erred in fact and in law in failing to hold that the appellant herein was an innocent purchaser for value and in cancelling his title deed when there was no evidence of fraud and wrong doing on his part the resultant to which the trial court proceeded on wrong principles in law.

7. THAT the learned trial Magistrate erred in law and fact when she made a finding that the suit property was fraudulently transferred to the appellant notwithstanding that no evidence of fraud was led by the plaintiffs as against the defendant/appellant. proceedings.

2. The Appellant sought for orders that the appeal be allowed and the judgment be set aside. He also sought for costs for the appeal.

Brief facts

- 3.** The Respondents filed a suit against the Appellant, vide a Plaint dated 19th December, 2022. They sought an order of revocation for title Kanyamkago/Kamgundho/1130 which was registered in the name of Samuel Ojema Okello, the Respondent's husband. It was their claim in the year 2012 their husband purported to sell the suit land, an act which was as a result of a subdivision parcel No. 1128, registered in the name of Samuel Ojema Okello. They claimed the acts were orchestrated by fraud which particularized as conducting the sale without parcel consent, selling the land the Land Control Board consent, and selling the land corruptly by the officers who were not responsible or authorized to conduct the transfer.
- 4.** The Appellant denied the allegations in the Plaint vide his Statement of Defence and Counterclaim dated 12th January, 2023. He sought for orders of permanent injunction restraining the Respondent's from occupying the suit parcel. He also sought for general damages for trespass and mesne profits.
- 5.** He pleaded prior to the Samuel Ojema had at his defendant's home for weeks claiming that he had an urgent family emergency of which a very sick member needed to be taken care of and

therefore he needed cash. Further, that prior to the sale, parcel number 1130 was part of parcel number 116 which was still registered in the name of Samuel Ojema's father's name and it measured 14.2 hectares.

- 6.** It was the defendant's further claim that he funded the entire succession process to have the land transferred from the deceased to Mr. Ojema's. He denied the allegations of fraud against him. He added that he was the sole legal proprietor of parcel number 1130. Lastly, he pleaded after the transfer of the suit land to Mr. Ojema, he (Ojema) refused to relinquish possession of the land and instead leased it to other persons and despite his (defendant's) protests he was informed that someone had gone ahead after the sale and built a house on the suit property. He prayed for the dismissal of the plaintiffs and filed a counterclaim
- 7.** In the Counterclaim, He pleaded that he was the sole owner of land parcel No. 1130. That he bought it after Mr. Aljama had in his home claiming that he had family relative who needed money for care. He pleaded further that he funded all the succession process and transferred original personal number into Mr. Ojema's name and subsequently a subdivision took place which gave rise to parcel 1130 which was transferred to his name A sale agreement

executed on Pastor 2012 was entered into and all completion documents Washington including the Land Control Board consent.

8. It was his further claim that after the enactment of the Land Registration Act 2012 there was a requirement that spousal consent is obtained before one obtains consent from the Land Control Board. He added that the plaintiffs were strangers to him (the defendant) and did not have any proof showing that they were married to Samuel Ojema or his children. He added that the plaintiffs had colluded with Samuel Ojema to defraud him of the land after benefiting from him. Further, if indeed they were genuine in their quest they should have sued Samuel Ojema. Also, he also added that they failed to sue the Land Registrar if their claim was that there was fraud. Lastly, he stated that the title to parcel number 1130 was issued on 13th of August 2012 which was ten (10) years prior to the institution of the suit. He added that the plaintiffs had their own land hence were trespasser on the suit land. He claimed a permanent injunction and general damages for trespass and mesne profits from August 2012 to the time of eviction.

Evidence

9. The suit proceeded to trial. The 1st Plaintiff testified as PW1 that the late Samuel Ogema was her husband and husband also to Jane Adhiambo and Risper Adongo. The suit land, parcel number Kayamkago/Kamgundho/1128 was her husband's land. It was her evidence that she did not know that her husband sold a portion of the land to George Omollo Owiti. She added the said Owiti claimed that a portion of the land had been sold to him. He moved to fence it but did not. She added that she had not gone to the Land Control Board over the sale. Her husband did not tell her that he sold the land.

10. She produced a number of documents in support of her case. She added she had children. She had birth certificates to show Samuel Ojema was her husband. She did not know where her husband left to in May 2013. He went away and had never been heard of except that people often said that he was seen in Nairobi.

11. The sale agreement bore her husband's signature on it. She added there was no witness to the agreement except that a lawyer had only stamped it. The advocate did not append his signature to it. There were no witnesses to the agreement. She did not know that the suit land belonged to the defendant. At one time a surveyor came to the land to survey it but did do any work. She

denied barring him from working. The surveyor only took measurements but did not fence it.

12. On cross examination she admitted that she did not have any documents to prove Samuel Ojema was her husband. She only had her identity card. Similarly, the other cowives had their own. She added that her went missing but she did not report to the police She only made a report to the district commissioner when they should a but she had never seen him nor would he be found She could not know whether after the end of seven years she was required to file a course for orders of presumption of death. She was not a party or witness to the agreement of sale.

13. On reexamination testified that their marriage was customary, under the Luo Customary Law. She and her husband did not conduct a Christian or civil marriage but customary. She could not tell if he was dead or not.

14. On his part, the defendant George Omollo Owiti testified that he was a consultant engineer. He adopted this statement dated 12th January 2023. He produced a List of nine documents to support his case as DExhibits numbers 1 to 9.

15. On cross examination he stated he bought land from Samuel Ojema on 11th August 2012. The said Samuel Ojema went to his

home because he had a healthy issue. He could not know if Samuel's family moved to Nairobi. He added the agreement was dated 11th August 2012 and signed and stamped. Further, that payments were Janes Onyango. Magare was included as a witness. He admitted he had not occupied the land since he bought it in 2012 to the time of suit. He did not know that Samuel Ojema disappeared. the suit he only saw his wives when they testified in court

16. He added that he finalized the succession following all due process and there were consents granted which led to him being granted the land. It was vacant at the time of testimony. The persons occupying it had been plowing and not living on it. Even when he bought Samuel had leased it to people who were growing sugar cane on it. He (defendant) agreed to allow them to continue with their farming.

17. On reexamination he confirmed that succession was done and the land transferred to Ojema. It was agreed that the title be registered in Ojema's name. When Samuel Ojema went to his house, he said he stayed there for three weeks. He added that his residence is in Karen. Further, Samuel signed the documents and he too did. He sent money into Samuel's account of which he

evidenced by way of documents. He stated that he was dealing with the owner of the land.

18. That concluded the matter.

19. The trial magistrate in her judgment dated 13th May, 2025 allowed the Respondent's case having found that they had proved illegality in the transfer of the suit property from their husband to the Appellant.

20. The trial magistrate also dismissed the Appellant's Counterclaim with costs.

21. The Appellant being dissatisfied with the judgment filed the present appeal which was canvassed by way of written submissions.

Submissions

22. Counsel for the Appellant filed his submissions dated 21st November, 2025 where he identified two issues for determination. The first issue was whether the Appellant is the right full owner of all that parcel of land which is known as Kanyamkago/Kamgundo/1130 and the second issue was whether the Respondents have a claim to Kanyamkago/Kamgundo/1130.

- 23.** On the first issue, while submitting in the affirmative, counsel relied on **Sections 24, 25 and 26** of the **Land Registration Act** and the case of **Joseph Komen Somek V Patrick Kennedy Suter ELC Eldoret Appeal No. 2 of 2016 (2018) eKLR.**
- 24.** It was his submission that Kanyamkago/Kamgundo/1130 was part of Kanyamkago/Kamgundo/116 which land was registered under Mr. Samuel Ojema father's name since it was inherited. He further submitted that upon sub-division, Kanyamkago/Kamgundo/1130, the suit property was properly transferred into the Appellant's name as evidenced from DEXH 7 and 8.
- 25.** He submits that no point during the succession process, did the Respondents raise any objection thus, a clean title was passed to Mr. Samuel Ojema and thereafter transferred to the Appellant.
- 26.** He submits that the Appellant is the absolute owner and proprietor of the suit land.
- 27.** On the second issue, counsel submits that the suit property was solely owned by Mr. Samuel Ojema after probate and that it was neither matrimonial property nor used as the Respondents' matrimonial home.

- 28.** He relied on **Section 5** and **6** of the **Matrimonial Property Act** and submits that the Respondents never proved that they were in fact married to Mr. Samuel Ojema. He argued that the Respondents were just but strangers to this suit with no locus standi to file the suit in the first place.
- 29.** He submits that in the unlikely event this honourable court does return a finding that the Respondents were indeed married to Mr. Ojema, he urged the court to find that the said marriage would only be a polygamous one to wit the provision of **Section 12 of the Marriage Act**. He cited the case of ***Nakuru E.K.N. V A.S. & 2 Others [2019] KEELC 3683 (KLR) [2019] KEELC 3683 (KLR)***
- 30.** He relied on the case of ***Kericho ELC Case No 56 of 2013 RCC V RKC [2018] eKLR*** and submits that the Respondents failed to prove fraud.
- 31.** He also filed a further submission dated 9th February, 2026 where he submits that the suit property was inherited by the purported estranged husband which the Respondents could not purport to have contributed in any way or form. He adds that the end result was that the estranged husband had full rights over the suit property and subsequently passed good title to the Appellant. He relied on the case of ***Resma Commercial Agencies V***

Ngattah (Suing as the Legal Representative of the Estate of Leah Wangui Ngata - Deceased) & another [2025] KECA 2214.

RESPONDENTS' SUBMISSIONS

32. I have perused the court record and CTS and the Respondents have not filed any submissions to the appeal.

Analysis and Determination

33. 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.

34. 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**. Being the case, I must bear in mind that I neither saw nor heard the witnesses testify. In the case above cited the court held:

“...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 ..."

35. It is this court's view that in determining the first issue, it is necessary to first establish the court's jurisdiction to determine the matter.

36. In the case of ***Owners of Motor Vessel "Lilian S" - Versus - Caltex Oil (Kenya) Limited (1989) 1 KLR*** the court held as follows:

"Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion

it is without jurisdiction...where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”.

- 37.** It is this court’s view that this court, under **Article 162(2) (b)** of the Constitution and **Sections 4 and 13 (1)** of the **Environment Land court Act**, is vested with original and unlimited jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and the title to land. Thus, the issues that this appeal turns on must be only those the court has jurisdiction to handle.
- 38.** In the suit giving rise to this appeal, it was the Appellant’s case that the suit property was owned by Mr. Samuel Ojema, and it was not matrimonial property. He claimed that Samuel Ojema legally transferred the suit parcel to him, and that the Respondents had not proved contribution in any way towards acquiring of the property. He emphasized that the three appellants had not proved that they were Ojiema’s wives.
- 39.** I have carefully analyzed the grounds of the appeal and the record, and particularly the trial magistrate’s findings. It is not in dispute that the trial court interrogated the allegations of fraud regarding

the transfer of the property from the plaintiffs' husband to the defendant. Further, that the transfer was done in contravention of the provisions of the Land Registration Act regarding spousal consent.

40. This main argument of the parties invited the court to determine an issue, of marriage, which this court does not have jurisdiction to. Thus, the court declines the invitation to determine whether the three were or were not wives Ojema who, according to the evidence on record is not known whether he is dead or alive. Further, it was not disclosed as to when he left home and never to return to the time of testimony.

41. From the Appellant's submissions, he largely brings out the issue that he rightfully acquired the suit property by virtue of it not being matrimonial property and that the Respondents had not proved that they were married to Samuel Ojema. This brings into view the question whether this court has jurisdiction to determine issues of marriage and matrimonial property.

42. In the case of ***Chuka HCCC. NO. 2 OF 2015 - AKM V NNN [2019] eKLR*** the court held as follows:

"35. The issue before this court is division of matrimonial property or put it another way sharing

of property acquired by two individuals during subsistence of their marriage. The marriage between the Plaintiff and the defendant was dissolved vide Chuka Principal Magistrate's Court Divorce Cause No. 4 of 2012 on 25th February, 2015. Upon dissolution of the said marriage, the Plaintiff brought this action to get a share of the properties she believes she made contributions towards their acquisition and developments thereon. Matrimonial proceedings for dissolution or other reliefs like maintenance are within the ambit of magistrate's court as provided under Section 2 of the Marriage Act. The Matrimonial Property Act No.49 of 2013 does not specifically define "court" but it is trite that issues of matrimonial properties are determined by the High Court under its inherent jurisdiction as provided under Section 3A of the Civil Procedure Act and Article 165(3)(a) of the Constitution of Kenya 2010."

On the other hand, the jurisdiction of the ELC Court is limited by Article 162(2) and (3) of the

Constitution of Kenya and Section 13(2) of the ELC Act No. 19 of 2011. Article 162(2) (b) states that ELC Court has the mandate to hear and determine disputes relating to use and occupation and title to land. The provisions of Section 13(2) of the ELC Act clearly gives power to ELC to hear and determine disputes relating to inter alia, environment, land use planning, title, boundary disputes, land administration and management, choses in action or other instruments granting enforceable interests in land among other related issues. The division of matrimonial property upon dissolution of marriage in my view is outside the purview or the scope of ELC and the relief cannot be granted in that court and it is only to that extent that I find that this cause though it touches on similar properties like the ones mentioned in the cited ELC Court in Embu, is not sub judice. What this court is being called upon to do can only be done in this court. Although the issue of ownership is claimed at the ELC, the claim arises from the contribution made by virtue of marriage

and it is not a challenge to the title of listed properties. As I have observed above the relationship between the parties herein was dissolved in 2015 and therefore the provisions of Matrimonial Properties Act No.49 of 2013 and Marriage Act No.4 of 2014 apply.”

17. Further, in the case of ***P A W-M V C M A W M MALINDI CIVIL APPEAL NO. 104 OF 2016 [2018] eKLR*** the court held as follows:

“However, what transpired before the learned Judge was different in the sense that both the divorce cause and the O/S were before the same Judge. The learned Judge separated the two matters by giving directions that they be heard separately which is a common practice in family matters as the grounds for divorce and rights to matrimonial property are distinct as they are also governed by different statutes. Accordingly, this ground of appeal is without merit.”

18. For the foregoing reasons I find that this court has no jurisdiction to determine issues touching on marriage and matrimonial

property which is the subject of this suit. In sum, I have no jurisdiction to determine issues of marriage between the Respondents and their alleged husband, or indeed, any parties generally.

18. Turning to the main issue in the matter, it is this court's view that the Appellant's claim of fraud cannot escape the scrutiny of evidence by this court in establishing whether the suit parcel was matrimonial property as defined by the law which is within the mandate of the High Court.
19. Notably, the trial court in consideration of the facts and law rightfully found that the suit parcel **Kanyamkago/Kamgundo/1130** was irregularly acquired by the Appellant.
- 43.** As I have stated above, the court record shows and, it is not in dispute that the trial court, indeed, interrogated the allegations of fraud in acquisition of the suit property by the Appellant from the Respondents' husband Samuel Ojema. It is also not in dispute that the trial magistrate rightfully found that the backbone of the case was that of family property and that the transfer to the Appellant

was fraudulent due to the lack of spousal consent from the Respondents.

- 44.** Moreover, the Defendant relied on a document he termed as an agreement of sale dated 11/08/2012. The Respondents testified that the said document was not signed by the advocate who allegedly drew it and before whom the Defendant and the said Ojema executed the same. This court has carefully analyzed the document. Indeed, it only bears the stamp of a lawyer by name Odhiambo & Company Advocates. It does not have his signature.
- 45.** This court notes and makes a finding that a stamp of a lawyer or any office or officer just as a mere seal on a document does not in any way authenticate the document in law. This is because anyone can draw a document and pick a stamp or seal of a person or office and affix it on the document and purport that to be due execution. That is not legally tenable. Only a signature or mark of a person or the holder of an office authenticates the document purporting to emanate from that office. Besides, there was a name and signature of only one person called James Magare, handwritten at the tail end of the 'agreement'. It did not indicate for whom he was witnessing the agreement. In any event there is no explanation why the said person did not witness the appending of the signature on each of

the pages allegedly affixed with the vendor's and seller's. Each of the parties' execution was not witnessed by an independent witness as required by law. The document said to be an 'Agreement' dated 11th August 2012, relied on by the defendant as such, cannot thus be or pass as one. That being so, the transaction offended **Section 3(3)** of the **Law of Contract Act**, Chapter 23 Laws of Kenya. The provision is that;

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

46. The real defect of the purported 'agreement' is that it was not attested by the lawyer before whom it was alleged to have been made, and the signature of each party not attested. It is not an agreement that can dispose of land.

47. Besides the 'agreement' which this court has since found not to have met the requirements of the law e Defendant produced as DExh 1, a Mutation Form. It was purportedly signed by the vendor at a wrong part of the page. He relied on a consent said to be issued on 18th July 2012 by the Uriri Land Control Board following a application dated 14th July 2012. It was marked as DExh 6. Attached to it was an application purportedly made by Samuel Okello. The Application is incomplete as it does not bear both the date the Consent refers to or even a Land Control Number, and importantly it is not signed by the purchaser hence defective and incapable of passing an interest in land.

48. In any event and very curiously unprocedural is that the consent to transfer was purportedly granted many days before (about a month) the transaction took place. Other than sheer fraud, it could not possibly be true that the

Land Control Board could grant a consent to a non-existent transaction.

49. The above are fundamental flaws that point to nothing but fraud in the transaction complained of by the Respondents, as were claimed in the trial court.

50. Lastly, the plaintiff stated in evidence that he funded the Succession Cause which gave rise to the land being transferred to Ojema and later to him. His evidence was that part of the purchase price of the land was the expenses of the succession cause. The land was in the name of the deceased father to Samuel Ojema, and they agreed that it be transferred to Ojema first and then to him. He admitted that he finalized the succession cause which led to the land was transferred to him. In his written statement, particularly at paragraph 5, the Appellant said that he funded the entire succession cause and then the land was transferred to him.

51. In any event, the payments purported to have been made by the Appellant to the said Samuel Ojema to do not tally with the contents of the purported 'agreement' which indicates that the total sum payable was to be Kshs. 620,000/=. This is because, there is no evidence that the Cheque for Kshs. 250,000/= does not show that it was ever handed over to the said Ojiema or ever cashed or paid; the purported voucher for Kshs. 50,000/= though not signed by the said Ojiema is the only payment possibly made to him to his Equity Account as evidenced by the deposit slip; and, whereas the cheque for KShs 150,000/= is shown to have received by Ojiema it does not show it was ever cashed by him. Thus, the only sum evidence proved to have been paid to Ojiema was the Kshs. 50,000/= on the date of the 'agreement'. Even if the payments were to be taken to have been made, they only amount to Kshs. 450,000/=:, which is not the sum 'agreed' upon by the parties. Since the transfer was made (in July 2012) without

any payment having been made and even without completion of the purchase price, there was fraud committed.

52. The Appellant's evidence is clear, first, that he entered into an agreement, if any, to buy land from a person who did not have capacity to sell any, thus, the transaction was void *ab initio*. Section 45 of the Law of Succession Act forbids such conduct.

53. From the analysis of the above evidence, it is clear to me that the trial court rightly arrived at the finding that the Plaintiffs, now Respondents, had proved their case to the required standard. Thus, in my humble view the trial court did not err in its finding. Consequently, the appeal is without merit and is hereby dismissed with costs to the Respondents.

22. Orders accordingly.

Judgment dated, signed and delivered virtually via the Teams Platform this 19th day of February 2026.

HON. DR. IUR F. NYAGAKA

JUDGE

From 1:10 PM in the presence of:

Esilaba for the Appellant

E. Awino for the Respondents