

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL NO.E42 OF 2023

DAVID ODHIAMBO ODWAR APPELLANT

VERSUS

JOSIA OGALO ORENGO RESPONDENT

(Being an Appeal from the Judgement and Decree of the Chief Magistrate at Kisumu, Hon. J. Wambilianga delivered on the 26th September, 2023 at the Kisumu Law Courts in MC ELC NO. 168 OF 2018)

J U D G E M E N T

Introduction

1. The record of appeal filed herein, dated 18th August, 2025, shows that the Appellant herein was the Defendant in Kisumu CMC ELC NO.168 OF 2018. Vide the amended plaint dated 18th November, 2018, the Respondent herein sued the Appellant over a parcel of land known as KISUMU/KADERO GOT NYABONDO/4010 (the suit land), claiming that he was the owner of the suit land, which was a sub-division of land parcel known as KISUMU/KADERO GOT NYABONDO/4010. The Respondent claimed that in 2013, the Appellant wrongfully

entered and took possession of the suit land and thereafter wrongfully remained in possession thereof. That by reason of the unlawful acts of the Appellant, he (respondent) had been deprived of and denied the use and enjoyment of the suit land and had suffered loss and hence claimed damages.

The Respondent therefore sought a declaration that he was entitled to exclusive and unimpeded right of possession and occupation of all the piece of land known as L.R. NO. KISUMU/KADERO GOT NYABONDO/4010, an order of permanent injunction, general damages for trespass, and costs of the suit.

2. The record shows that vide the amended Defendant's statement of defence dated 18th January, 2021, the Appellant denied the Respondent's claim and averred that transfer of the suit land in favour of the Appellant was fraudulent as there was no succession to the estate of the deceased, no consent of the family members and no due process in the subdivision of the land. The Appellant urged the court to dismiss the suit with costs.
3. The record shows further that the suit was heard before the trial court, which vide the judgement delivered on 26th September,

2023, found that the Respondent had proved his claim on a balance of probabilities and entered judgement in his favour for;

- a) a declaration that the Plaintiff (Respondent herein) was entitled to an exclusive and unimpeded right of possession and occupation of all that piece of land known as L.R. NO. KISUMU/KADERO GOT NYABONDO/4010
- b) a declaration that the Defendant (Appellant herein), whether by himself or servants, agents, or otherwise, is wrongfully in occupation of the suit land and accordingly, a trespasser on the same
- c) an order of permanent injunction restraining the Defendant (Appellant herein), his servants, agents, workers, proxies, representatives, and/or any other person assigned or with their authority carrying out any construction, cultivation, using or trespassing or encroaching on the Plaintiff's (Respondent's) land parcel NO. KISUMU/KADERO GOT NYABONDO/4010.
- d) Cost of the suit.

The Appeal

4. Dissatisfied with the judgement, the Appellant preferred the present appeal vide the Memorandum of Appeal dated 18th December, 2023 pursuant to leave to appeal out of time granted on 25th April 2024, seeking that the appeal be allowed, the judgment dated 26th September, 2023 be set aside in entirety, the subsequent order be vacated, dismissing the Respondent's case in the lower court with costs.

The Appellant also seeks that the costs of the appeal be awarded to him.

Submission

5. Pursuant to directions given on 7th October, 2025, the appeal was heard by way of written submissions.

Written submission dated 29th October, 2025 were filed by Saende Law Advocates on behalf of the Appellant. Written submissions dated 11th December, 2025, were filed by Ngala Awino & Company Advocates for the Respondent.

Issues for determination

6. Although the Memorandum of Appeal presented 6 grounds of appeal, the Appellant, vide his submissions, compressed these into 3 issues for determination, namely;

- (i) Whether Carren Akinyi Onyango (now deceased) had the legal capacity to deal with the property of her late husband, the late Gabriel Onyango Mumbo.
- (ii) Whether the Respondent has a legal title in the suit property.
- (iii) Whether the judgment of the trial court should be set aside.

The Respondent similarly framed issues for determination as follows:-

- (i) Whether the Respondent was a bona fide purchaser for value without notice.
- (ii) Whether the Respondent fraudulently and/or illegally acquired title to the suit parcel No. KISUMU/KADERO GOT NYABONDO/4010.
- (iii) Whether the Appellant is entitled to the suit parcel No. KISUMU/KADERO GOT NYABONDO/4010 in any way whatsoever.

7. From the foregoing, the Court finds that the issues for determination in this appeal are;

- (i) Whether or not the Respondent proved before the trial court that he had a good title to the suit land.
- (ii) Whether or not the Appellant trespassed onto the suit land.
- (iii) Whether or not the trial court erred in allowing the Respondent's claim.
- (iv) Whether or not the appeal has merit.
- (v) Costs of the appeal.

Analysis and determination

8. This being a first appeal, this court is obligated to re-analyse the evidence/material placed before the trial court and draw its own conclusions. In *Selle & Another vs Associated Motor Boat Company Limited and Others [1968] EA 123*, it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact by the court below. It stated

“An appeal to this 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 conclusion, though it should always bear in mind that it

has neither seen nor heard the witnesses and should make due allowance in that respect.”

9. The first ground of appeal is whether or not the Respondent proved before the trial court that he had a good title to the suit land.

The appellant through grounds 1, 2 and 3 of the grounds of appeal faulted the trial court for holding that the Respondent was entitled to the suit land yet the Respondent had not discharged the standard of proof and for finding that property of a deceased person can be dealt with without the pursuit of Letters of Administration and in finding that a full grant of Letters of Administration of a deceased person can be issued within 3 months. In essence, the Appellant contends that the Respondent did not prove that he had a good title to the suit land.

10. The Respondent had pleaded in paragraph 3 of the amended plaint that he was at all material times the proprietor of land parcel known as KISUMU/KADERO GOT NYABONDO/4010 and in paragraphs 4 and 5 pleaded how he acquired ownership of the land. He stated that he bought a portion of land known as KISUMU/KADERO GOT NYABONDO/1351 legally from one Caren

Akinyi Onyango, and the land was subdivided to produce the suit land, which the Respondent got. He pleaded that he followed the legal procedures and guidelines when procuring the suit land.

11. The Respondent testified and adopted the contents of his witness statement wherein he had narrated how he bought the suit land. He produced a land sale agreement dated 1st September, 2012, a copy of the certificate of official search, a copy of the green card, among other documents, to demonstrate ownership.

12. The record shows that vide the amended statement of defence, the Appellant denied that the Respondent was the proprietor of the suit land. The Appellant further denied that the Respondent had complied with the laws and procedures in acquiring the suit land. In paragraph 11, the Appellant averred that the Respondent had fraudulently transferred the suit land into his name.

13. In his testimony, the Appellant adopted his witness statement wherein he had stated that land parcel NO. KISUMU/KADERO GOT NYABONDO/1351 belonged to his uncle by the name Gabriel Onyango Mumbo, deceased. That Caren Akinyi Onyango

was the wife of Gabriel Onyango Mumbo. That nobody had ever filed succession to the estate of Gabriel Onyango Mumbo, and that therefore any transfer in respect of his estate was fraudulent. He stated further that the subdivision and transfer should be cancelled and the land be reinstated in the name of Gabriel Onyango Mumbo.

14. A reading of the judgment shows that the court considered the issue of whether or not there were Letters of Administration in place in respect of the estate of the registered owner when the sale agreement was done.

The trial court observed that it had considered the documents produced, that the Defendant, who stated that Caren intermeddled with the estate of her husband, ought to have proved the same.

That the Defendant (Appellant herein) did not call any witnesses, such as a chief, to indicate so. That the Defendant (Appellant herein) ought to have produced the green card or mutation for parcel No.1351 to demonstrate how the subdivision was done, and whether there were other parcels that came out of it.

The court then concluded that the Respondent was a bona fide purchaser for value and that he held title in accordance with section 26 of the Land Registration Act.

15. It has been submitted in this appeal on behalf of the Appellant that Caren Akinyi, the widow of Gabriel Onyango, never obtained Letters of Administration to the estate of the deceased. That no evidence whatsoever tendered to demonstrate that Cared had the legal authority to dispose of her late husband's estate. That it was a fundamental error for the trial court to presume that such authority existed; the error went to the root of the judgment.

16. Counsel relied on section 45 of the Law of Succession Act, which makes intermeddling with the estate of the deceased an offence, the cases of RC Estate of Asman Nabwaya Shubwabo (deceased) [2018]eKLR and Re Estate of Christopher Peti Okiya (Deceased) [2023]KEHC 18057 KLR to support the submission that a person who purchases property belonging to a deceased person from a person who has not obtained a grant of representation intermeddles with the estate of the deceased and that the process of obtaining Letters of Administration cannot be cut short.

17. It was submitted on behalf of the Respondent that the Respondent was a bona fide purchaser for value. That the Respondent adduced evidence that, after exercising due diligence and carrying out a search, he found that the land was registered in the name of Caren Akinyi Onyango, now deceased, from whom he bought the land and paid the full purchase price to her.

That there were no Letters of Administration required at the time of purchase, as the seller, Caren Akinyi Onyango, was the registered owner by then and was still alive.

Counsel relied on the case of Chemei Investment Limited -vs- The Attorney General & Others, Nairobi Petition No.94 of 2005 and R.G. Patel -vs- Lalji Makami as cited in Gladys Wanjiru Ngacha -vs- Theresa Chepsaat & 4 Others [2013] KECA 29 (KLR) that fraud must be proved to the required standard.

18. I have considered the pleadings and evidence placed before the trial court and the submissions made herein. The Respondent had produced a land sale agreement dated 1st September, 2012 to demonstrate the basis of his claim.

The agreement was for the sale of a land parcel known as KISUMU/KADERO GOT NYABONDO/1351, which was being sold

as a whole at KShs. 300,000/-. The parties to the agreement were Karen Akinyi, Identity Card No.25806408 as the Vendor and the Respondent herein Josiah Ogalo Orenge, Identity Card No.2251137, as the Purchaser.

19. The Respondent's case before the trial court was that before entering the sale agreement, he did due diligence by purchasing a certificate of official search in respect of the land and obtained a green card, both of which confirmed that the land was in the name of the Vendor. However, the certificate of official search produced was in respect of land parcel No. KISUMU/KADERO GOT NYABONDO/4010. The same applies to the Green card, which shows that the register in respect of land parcel No. KISUMU/KADERO GOT NYABONDO/4010 was opened on 9th August, 2012, and first registered in the name of Carren Akinyi Onyango, who later on 22nd March, 2013, transferred the land to the Respondent.

The green card also shows that the land parcel No. KISUMU/KODERO GOT/NYABONDO/4010 was a subdivision of parcel No.KISUMU/KODERO GOT NYABONDO/1351.

The meaning of this is that by 1st September, 2012, when the sale agreement was being executed, land parcel No.1351,

which was being sold, did not exist. Further, there is no evidence that as at 9th August, 2012, land parcel No.1351 was in the name of the Vendor so that the doctrine of bona fide purchaser could apply.

There is no evidence that a search for parcel No.1351 was ever bought by the Respondent as part of due diligence for the transaction of the land sale agreement.

The search produced by the Respondent as an exhibit has a date of 14th February, 2020. It was not denied that land parcel No.1351 belonged to the deceased and that, as at the time of his death, the land was in his name. There was no evidence whatsoever that succession to the estate of the deceased had been undertaken by Karen Akinyi Onyango to give her capacity under the provisions of sections 2 and 82 of the Law of Succession Act to transact in the estate of the deceased.

20. The Appellant had challenged the root of the Respondent's title by pleading in the amended statement of defence that the title was procured by fraud. The Respondent had the burden to prove that the root of his title was above board. This burden was not discharged as there was no evidence of the due diligence conducted by the respondent, the agreement was in

respect of the whole of land parcel No. KISUMU/KODERO GOT NYABONDO/1351, while the claim herein is for only a subdivision thereof, and there was no evidence that the land was lawfully transmitted from the deceased original registered owner.

Issue one is therefore determined in the negative. The Respondent did not prove before the trial court that he had a good title to the suit land.

21. The second issue for determination is whether or not the Appellant trespassed onto the suit land. The Respondent's claim was based on the tort of trespass. Trespass is interference with or intrusion into the property of another. In the case of Alex Waigara Mwaura -vs- China Power Company Limited and another [2020]eKLR, trespass was defined as

“an intrusion by a person into the land of another who is in possession or ownership.”

Having failed to prove that he had a good title to the suit land, the Respondent could not sustain a claim based on trespass.

22. On whether the trial court erred in allowing the Respondent's claim, on the basis of evidence before the trial court, I find that the court erred in allowing the claim.

I find that the appeal has merit and hereby allow it.

The judgment of the trial court is set aside and replaced with a judgment dismissing the suit.

Costs of the appeal are awarded to the Appellant.

Orders accordingly.

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

**E. ASATI,
JUDGE.**

In the presence of:

Maureen- Court Assistant.

N/A for the Appellant.

Odah for the Respondent.