

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC APPEAL NO. E006 OF 2025

ALBERT OCHIENG ODHIAMBO 1ST

APPELLANT/APPLICANT

KALARA ATIENO ODHIAMBO (DECEASED) .. 2ND

APPELLANT/APPLICANT

(suing as the personal representatives
of the late **PETER PATRICK ODHIAMBO ODINYA**)

= VERSUS =

WILLIAM BUNYASI MAKOKHA RESPONDENT

(sued/suing as the personal representative
of the late **STEPHEN MAKOKHA KIMIDA alias KIMITA**)

(Being an appeal from the judgment of **HON R. ODENYO** Senior Principal
Magistrate delivered on 2nd April 2025 in Busia Chief Magistrates Court **ELC**
Case **NO 13** of **2018**)

J U D G M E N T

1. **ALBERT OCHIENG ODHIAMBO** and **KALARA ATIENO ODHIAMBO** (the 1st and 2nd Appellants respectively) are the son and wife respectively of the late **PETER PATRICK ODHIAMBO ODINYA** (herein **ODINYA**) who died on 12th June 2001. At the time of his demise, **ODINYA** was the registered proprietor of the land parcel **NO BUKHAYO/EBUSIBWABO/508** having been issued with the

title deed thereto on 12th July 1983. The 2nd Appellant is now also deceased having died on 19th March 2026 while this judgment was pending delivery. Prior to that, the Appellants had moved to the Busia Chief Magistrates as legal representatives to the Estate of **ODINYA**.

2. **WILLIAM BUNYASI MAKOKHA** (the Respondent) is the legal representative to the Estate of his late father **STEPHEN MAKOKHA KIMIDA** (herein **KIMIDA**) who, prior to his demise on 10th February 1979, had been the first registered proprietor of the suit land since 15th January 1971. The register to the suit land also shows his name as **MAKOKHA KIMITA** but I have no doubt from the record herein that the name **KIMIDA** and **KIMITA** refer to one and the same person.
3. The Appellants, suing as the legal representatives of the Estate of **ODINYA**, moved to the subordinate Court in which they sued the Respondent also as the legal representatives of the Estate of **KIMIDA**. It was the Appellants' case that at all material times, the deceased **ODINYA** was the registered proprietor of the suit land having purchased it from **KIMIDA** in or around 1981. They therefore sought judgment against the Respondent with respect to the suit land as follows:

- a) **An order of permanent injunction restraining the Respondent, his workers, agents and employees from interfering with the suit land.**
- b) **A declaration that the deceased ODINYA is the sole owner of the suit land.**
- c) **An order for the eviction of the Respondent, his agents, servants and any other persons from the suit land.**
- d) **Costs and interest.**
- e) **Any other relief this Honourable Court deems fit.**

The Respondent filed a defence and counter-claim dated 20th march 2018. They denied the averments in the plaint adding that if **ODINYA** is the registered proprietor of the suit land, then the same was obtained fraudulently from the Estate of **KIMIDA**. They set out the particulars of fraud in paragraph 6(a) to (h) of their defence. He added that he and the family of **KIMIDA** have continued to be in possession of the suit land since 1972.

4. The Respondent sought by his counter-claim the following orders against the Appellants:

- a) **A declaration that the registration of ODINYA as the proprietor of the suit land was irregular, null and void as it was obtained through fraud and the Land Registrar should be directed to cancel the title and the same to revert back to the name of KIMIDA as it was before 8th October 1981.**
- b) **The Busia County Land Registrar to effect the orders in (a) above.**
- c) **The Respondent claims for costs of the counter-claim.**
- d) **The Appellants' suit be dismissed with costs.**

5. The suit was heard by **HON R. ODENYO** Senior Principal Magistrate. The 1st Appellant was the only witness who testified on behalf of the Appellants. The Respondent testified and called five (5) defence witnesses one of whom **EMMANUEL KENGA (DW6)** was an expert witness being a document examiner.

6. Having considered all the evidence herein, the trial magistrate found that the Appellants had failed to prove their case. He dismissed their suit but stated that due to their long stay on the suit land, he would not penalize them

with costs. He found the Respondent's counter-claim proved and entered judgment for him accordingly but ordered that the parties bear their costs.

7. The Appellants are aggrieved by the judgment and vide their amended memorandum of appeal dated 30th September 2025, they have raised the following three (3) grounds of appeal:

- 1) That the learned trial magistrate erred in law and/or fact in dismissing the Appellants' suit upon finding that the Appellants had not proved their case against the Respondent on a balance of probability.
- 2) That the learned trial magistrate erred in law and/or fact in entering judgment in favour of the Respondent against the Appellants upon finding that the counter-claim by the Respondent had been proved sufficiently.
- 3) That the learned trial magistrate erred in law and/or fact in ignoring and/or misapprehending the Appellants' written submissions and/or the totality of the evidence on record.

The Appellants seek the following orders:

- 1: This appeal be allowed and the whole of the judgment of the trial Court be set aside including the judgment in favour of the Respondent against the Appellants as prayed in the counter-claim.**
- 2: This appeal be allowed and the Appellants' suit before the trial Court be allowed as prayed.**
- 3: Costs of this appeal be borne by the Respondent.**
- 4: Any other or further orders which this Honourable Court may deem fit and just to grant.**

This being a first appeal, my duty is to re-consider and re-evaluate the evidence on record and thereafter, draw my own conclusions. In so doing, I must always remember that un-like the trial Court, I neither saw nor heard the witnesses as they testified. I must therefore give due allowance in that regard. Where the trial Court's findings are based on no evidence or the Court is shown to have acted on wrong principles, then this Court as an Appellate Court must interfere with those findings. If the trial Court on the other

hand properly analyzed the facts and applied the law, then this Court must up-hold those findings. In that regard, there are many cases to guide this Court including **SELLE & ANOTHER -V- ASSOCIATED MOTOR BOAT COMPANY LTD 1968 E.A 123, MWANASOKONI -V- KENYA BUS SERVICES LTD 1985 KECA 82 KLR [C.A CIVIL APPEAL NO 35 of 1985** and also **PETERS -V- SUNDAY POSTS LTD 1958 E.A 424** among other cases.

8. In the case of **PETERS -V- SUNDAY POST LTD** (supra), the then Court of Appeal for Eastern Africa stated at page 429 that:

“It is a strong thing for an appellate Court to differ from the findings on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness.”

And in the case of **MWANASOKONI -V- KENYA BUS SERVICES LTD** (supra), the Court having cited the decision of **PETERS -V- SUNDAY POST LTD** (supra) went on to add that:

“But the jurisdiction ‘to review the evidence’ should be exercised with caution. It is not

enough that the appellate Court might itself have come to a different conclusion.

Accordingly only when the finding of fact that is challenged on appeal is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding he did will this Court interfere with it.”

In the impugned judgment at page 5 (page 12 of the record of appeal) the trial magistrate set out the issues for his determination as follows:

- a) “Was the registration of L.R NO BUKHAYO/EBUSIBWABO/508 in the name of PETER PATRICK ODHIAMBO lawful?”**
- b) Who pays the costs of this suit?”**

I agree with that. Basically, the issues for determination by the trial magistrate were whether the deceased **ODINYA** had acquired a proper title of the suit land from the deceased **KIMIDA** or the same was done illegally and fraudulently and was for cancellation. The three (3) grounds of appeal can therefore be canvassed together and they amount to this; did **ODINYA** obtain a proper title to the suit

land and which can be protected by the provisions of **Article 40(1)** of the **Constitution**? Counsel for the Appellants has submitted that **ODINYA** acquired a proper title to the suit land from **KIMIDA** sold to him in the 1960s/1970s and which was transferred in 1981. On the other hand, counsel for the Respondent has submitted that infact **KIMIDA** was already deceased when the transfer was done and the documents produced to prove the said transfer were forgeries and so the title in the name of **ODINYA** is void *ab initio*.

9. As stated at the commencement of this judgment, the title deed to the suit land has since 12th July 1983 been registered in the name of **ODINYA**. The Respondents have questioned it's validity. However, as was held in the case of **MUNYU MAINA -V- HIRAM GATHIHA MAINA 2013 KECA 94 KLR [C.A. CIVIL APPEAL NO 239 of 2009]**, the Court of Appeal stated thus:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go

beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

The above reasoning was affirmed by the Supreme Court in the case of **DINA MANAGEMENT LTD -V- COUNTY GOVERNMENT LTD OF MOMBASA & 5 OTHERS 2023 KESC 30 KLR** which went on to add at paragraphs 20 and 21 of it’s judgment that:

20: “The title or lease was an end product of a process. If the process that was followed prior to the issuance of the title did not comply with the law, then such a title could not be held as indefeasible ...”

21: “Article 40 of the Constitution entitles every person to the right to property subject to the limitations set out therein. Article 40(6) limited the rights as not extending them to any property that had been found to have been unlawfully acquired.”

The Appellants' case in the trial Court was that **ODINYA** purchased the suit land in or around 1981 from **KIMIDA**. This is what the 1st Appellant stated in paragraph 4 of his statement dated 30th July 2019:

4: "That at all material time relevant to this suit, the deceased Peter Patrick Odinya Odhiambo was the owner of the parcel number BUKHAYO/EBUSIBWABO/508 which he bought from one MAKOKHA KIMITI deceased in or around 1981 when it was registered in the deceased name."

In his statement dated 22nd October 2019, the Respondent states in paragraphs 5, 6, 21 and 25 as follows:

5: "I am a son to the deceased Stephen Makokha Kimida who died on 10.2.1979."

6: "The deceased Stephen Makokha Kimida was the registered owner of the land parcel number Bukhayo/Ebusibwabo/508 until the time of his death on 10.2.1979."

21: "Makokha Kimida never sold the whole parcel known as Bukhayo/Ebusibwabo/508 to Peter Odhiambo Odinya as stated in

paragraph 3 of the plaint because the year claimed to have bought the suit land in 1981, Makokha Kimida was already deceased.”

25: “The documents were prepared and signed in 1981 when the deceased had already passed on in 1979.”

There was also the evidence by the Forensic Document Examiner **MR EMMANUEL KENGA** who testified on behalf of the Respondent and produced the report which he had prepared after examining whether the documents relating to the transfer of the suit land to **ODINYA** were infact signed by **KIMIDA**. His testimony was that the signatures on the disputed documents and the known signatures of **KIMIDA** had no similarities.

10. The trial magistrate considered all the above and at page 6 of the impugned judgment (page 13 of the record of appeal) he addressed the issue as follows:

“The contesting conditions are not backed by any written agreement or other such document. Thus the only documents that are available to Court are the transfer documents which included

an application to the land control board for consent and a transfer from both purported to have been signed by Stephen Makokha Kimila (sic) deceased. As observed by DW6 Mr Emmanuel Kenga, the signatures vary considerably from the ones said to have been signed by the same person in the year 1971. The two transfer documents were said to have been signed in 1981.

Even if this Court were to take it that the signature of the said Makokha Kimita would have changed/mutated over a period of time specifically 10 years, it would still not be convincing taking into account the evidence on record that the said Makokha Kimita died in the year 1979.

It is my finding that the transfer documents presented to the Registrar of lands in the year 1981, two years after the death of the purported transfer, were not genuine. It follows that the registration of the suit land in the name of Peter

Patrick Odhiambo Odinga (sic) deceased, was fraudulent.”

11. From the evidence on record, there was no other decision which the trial magistrate could have arrived at other than that the registration of the suit land in the name of **ODINYA** was fraudulent.
12. Firstly, there was evidence by way of the death certificate confirming that infact **KIMIDA** died on 10th February 1979 following belly ache and diarrhea. The authenticity of that death certificate was not disputed. The said **KIMIDA** could not have entered into any land sale agreement with **ODINYA** in respect to the suit land in 1981 some two years after his death. And among the documents filed by the Appellants to confirm that **KIMIDA** had sold the suit land to **ODINYA** in 1981 included a transfer of land allegedly executed by **KIMIDA** on 25th June 1981. That was clear evidence of fraud.
13. Secondly, there was the evidence of the Forensic Document Examiner **EMMANUEL KENGA**. The totality of his evidence was that **KIMIDA** could not have signed the transfer documents purported to have been signed by him in 1981 transferring the suit land to **ODINYA**. That was evidence of

an expert witness which was not controverted and which the trial magistrate was entitled to accept in arriving at the decision which he did. As was held by the Court of Appeal in the case of **KIMATU MBUVI T/A KIMATU MBUVI & BROSS -V- AUGUSTINE MUNYAO KIOKO C.A. CIVIL APPEAL NO 23 of 2001 [2007 I E.A. 139]** with regard to the evidence of an expert witness:

“... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.”

Courts must give proper respect to the opinion of experts but the same can also be rejected if there is good reason to do so. So such opinions are not binding on the trial Court which must make it's own decision taking into account all the evidence before it. See also the case of **PARVIN SIGNII DHALAY -V- R 1997 eKLR [1995 - 1998 I E.A. 29]**.

14. The trial magistrate heard the evidence of the expert witness and accepted it. I have also looked at the report of that witness dated 9th October 2023. He is a retired former Commissioner of Police and a document examiner of more than 32 years trained locally and also in Israel, France and Tanzania and has given expert evidence in many Courts. He therefore laid a proper basis for the admission of his evidence which was not controverted. I am persuaded that the trial magistrate did not err in admitting and relying on it.
15. The above evidence of the expert witness, taken together with the evidence that **KIMIDA** was already deceased in 1981 when he was alleged to have signed the transfer documents purportedly transferring the suit land to **ODINYA**, could only lead to the irresistible conclusion that the transfer of the suit land to **ODINYA** was illegal and fraudulent.
16. The Appellants' claim was clearly for dismissal and the trial magistrate did not err either in fact or in law in dismissing it.
17. Having dismissed the Appellant's case, it followed that the trial magistrate could only allow the Respondent's counter-claim and revert the title to the suit land to the name of **KIMIDA** as it was prior to 1981.

18. With regard to costs, the Appellants urged this Court to dismiss the Respondent's counter-claim with costs. The Respondent on the other hand urged this Court to award him costs.
19. Costs follow the event **"unless the Court or judge shall for good reasons otherwise order."** That is set out in **Section 27** of the **Civil Procedure Act**. This is how the trial magistrate addressed himself in the last paragraph of the impugned judgment:
- "On a balance of probability, the plaintiffs have failed to prove their case against the defendant. I thus dismiss the plaintiffs' suit. However due to their long stay on the land, I make no orders as to costs. The counter-claim by the defendant has been proved sufficiently and I enter judgment for the defendant against the plaintiffs as prayed in their counter-claim. Each party to bear their own costs."**
20. The trial magistrate was not minded to penalize either of the parties with regards to costs. He gave his reasons. I shall not interfere with his discretion on costs.

21. Ultimately therefore and having considered this appeal, I make the following dispositive orders:

- 1) The appeal is dismissed.**
- 2) The judgment of the trial magistrate Court is up-held.**
- 3) The parties shall meet their own costs both here and in the subordinate Court.**

**BOAZ N. OLAO
JUDGE
9TH APRIL 2026**

Judgment dated, signed and delivered by way of electronic mail on this 9th day of April 2026 and with notice to the parties.

Right of Appeal.

**BOAZ N. OLAO
JUDGE
9TH APRIL 2026**

Explanatory notes:

This judgment was due on 17th February 2026. However, following my transfer to Iten Court from Busia Court and which was effective 15th January 2026, I had to prioritize my part heard cases. That has contributed towards the delay in delivering the same. The delay is regretted.

**BOAZ N. OLAO
JUDGE
9TH APRIL 2026**