

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ELC L.AND APPEAL CASE NO. E017 OF 2024

FLORENCE NYADERA OTIENO.....
.....APPELLANT

VERSUS

GEORGE OCHIENG ODHIAMBO.....1ST
RESPONDENT

DISTRICT LAND REGISTRAR BONDO
RARIEDA REGION.....2ND
RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD
RESPONDENT

NORRAH LINDA WASIKE.....4TH
RESPONDENT

**(Being an appeal from the Judgement of Hon. P. Nandi
delivered on 31st May 2024)**

JUDGEMENT

1 George Ochieng Odhiambo (the 1st Respondent herein) approached the Chief Magistrate's Court Bondo vide his Amended plaint dated 25th July 2022 seeking judgment against Florence Nyadera Otieno (appellant herein), Norrah Linda Wasike, District Land Registrar Bondo and the Attorney General Administrator (2nd 3rd 4th Respondents in this appeal) in the following terms with

respect to plot No Siaya Omiya Diere/139 (the suit property); -

- 1) A declaration that the subdivision of Suit Property into **Siaya/Omia Diere/3737 & 3738** and subsequent registration of John Mboga Ochola (Deceased) and Adonijah Nyadera Otieno (Deceased) as the registered owner of parcel **Siaya/Omia Diere/3737&3738** respectively are fraudulent, illegal and hence null and void.
- 2) A declaration that John Mboga Ochola (Deceased) is and was the Registered proprietor of Siaya/Omia Diere/139 or the suit property.
- 3) An order of cancellation of the resultant titles Siaya/Omia Diere/139, an order for the amendment of the map to restore land parcel Siaya/Omiya Diere/139 and **issuance of title Siaya/Omia Diere/139 in the name of John Mboga Ochola**
- 4) A permanent injunction restraining the Defendants either by themselves, agents, and or servants from selling, leasing, subdividing, constructing, developing or in any way dealing with **Siaya/Omia Diere/3737&3738** or **Suit Property**.
- 5) An order that the 1st Defendant her agents, servants and anyone claiming under her authority be and are hereby evicted from the suit property.
- 6) General damages
- 7) Costs

- 8) Any other or further remedy that this honourable court may deem fit and just to grant.
- 2 The basis of his claim was that he was entitled to the suit property as beneficiary grandson of the estate of John Mboga Ochola who was the registered owner of the suit property holding a title deed issued on 9/7/98. His case was that the suit property was illegally and fraudulently closed on subdivision into two parcels Siaya Omiya Diere/3737 & 3738 on 14/4/1999 after the death of the said John Mboga Ochola which subdivisions were likewise transferred to Adonijah Nyander (deceased) and John Mboga Ochola on even date without grant of letters of administration of the estate John Mboga Ochola with the help of the defendants. The particulars of fraud on the part of the 1st and 2nd defendant were set out at 9 of the amended plaint.
- 3 According to the plaintiff the foregoing actions have caused him damage and loss denying him right to access, inherit, use and occupy part of the suit property thus the prayers herein.
- 4 The Appellant Florence Nyadera Otieno sued as the 1st defendant responded to the suit vide Written Statement of Defence dated 9/6/2021 and amended statement of defence dated 29/09/2022 (page 6 - 11 of amended supplementary record of appeal). Her case was that her husband Adonijah Nyander purchased a portion of the land for valuable consideration on 21/8/1994 from John Mboga

Ochola. That upon the subdivisions the vendor retained Siaya Omiya Diere/3738 and her husband was registered under Siaya Omiya Diere/3737. She denied all the particulars of fraud and stated that the acquisition was lawful,

- 5 The trial court heard the suit and delivered its judgement on 31/5/2024 in favor of the plaintiff as prayed.
- 6 Aggrieved by the judgement the Appellant has filed this appeal vide Memorandum of Appeal dated 25/6/2024 raising the following grounds of appeal; -
 - 1) THAT the Learned Trial Magistrate erred in law and fact in finding that the 1st Respondent had proved his case on a balance of probabilities in the absence of the Appellant's evidence to controvert the Plaintiffs case.
 - 2) THAT the Learned Trial Magistrate erred in law and fact in failing and/or refusing to re-open pleadings to enable the Appellant herein to seek leave to file her List of Witnesses, Witness Statement, List and Bundle of Documents that she sought to rely on at trial.
 - 3) THAT the Learned Trial Magistrate erred in law and fact in declining to admit the Appellant's List and Bundle of Documents and Witness Statements when it was evident that the absence of the Appellants List and Bundle of Documents and Witness Statements in the court file was not a fault of the Appellant but of the court registry that failed to place the same in the court file upon filing.

- 4) THAT she Learned Trial Magistrate erred in law and fact condemned the Appellant when court proceedings showed that the Appellant's Advocate had been ailing for a long time.
- 5) THAT the Learned Trial Magistrate erred in Law and fact by failing to hold that the Appellant had a right to be heard in accordance with Article 22 (3) (d) of the Constitution of Kenya, 2010.
- 6) THAT The Learned Trial Magistrate erred in law and fact in allowing Procedural Technicalities to override Substantive Justice contrary to Article 199(2) (d) of the Constitution of Kenya, 2010 by disallowing the Appellant's Application to place her List and Bundle of Documents and Witness Statements
- 7) THAT the Learned Trial Magistrate erred in law and fact by failing to consider evidence on record which failure occasioned miscarriage of justice.
- 8) THAT the Learned Trial Magistrate erred in law and fact in declaring that the subdivision of the suit property into land Title Number SIAYA/OMIYA DIERA/3737 and land TITLE Number SIAYA/OMIYA DIERA/3738 and the subsequent registration of JOHN MBOGA OCHOLA (deceased) and ADONIYAH NYADERA OTIENO (deceased) as registered owners of land Title Number SIAYA/OMIYA DIERA/3737 and land Title Number SIAYA/OMIYA DIERA/3738 respectively were fraudulent and illegal and thus null and void.
- 9) THAT the Learned Trial Magistrate erred in law and fact in finding that JOHN MBOGA OCHOLLA (now deceased) was

and is still the registered proprietor of Land Title Number SIAYA/OMIA DIERE/139.

- 10) THAT the Learned Trial Magistrate erred in law and fact in issuing an order for the cancellation of the titles in respect of land title No. SIAYA/OMIYA DIERA/3737 and 3738.
- 11) THAT the Learned Trial Magistrate erred in law and fact in issuing an order directing the Land registrar to amend the MAP to restore SIAYA/OMIYA DIERA/139 and issuance of title SIAYA/OMIYA DIERA/139 in the name of JOHN MBOGA OCHOLLA.
- 12) THAT the Learned Trial Magistrate erred in law and fact in issuing a permanent injunction restraining the defendants from selling, leasing, subdividing, constructing and developing or in any way dealing with the land title SIAYA/OMIYA DIERA/3737 and 3738.
- 13) THAT the Learned Trial Magistrate erred in law and fact by exercising jurisdiction it does not have contrary to section 45 of the Law of Succession Act
- 14) THAT the Learned Trial Magistrate erred in law and fact in issuing an eviction order against the Appellant from the suit property
- 15) THAT the Learned Trial Magistrate erred in law and fact in ordering the defendants to surrender a vacant possession of the suit property within 90 days from the date of service upon them of the said judgement delivered on 31st May 2024

- 16) THAT the Learned Trial Magistrate erred in law and fact in awarding the 1st Respondent general damages of Kshs 200,000/-
 - 17) THAT the Learned Trial Magistrate erred in law and fact in awarding the plaintiff costs of the suit.
 - 18) THAT the Learned Trial Magistrate decision if allowed to stand shall expose the Appellant to a grave injustice as he is poised to lose the suit property even when it is clear from the Magistrates court decision that the appellant has been condemned unheard.
- 7 On the strength of the foregoing the Appellant prays that the judgement of the Principal Magistrate delivered on 31st May 2024 be set aside and this court be pleased to order for trial de Novo.

SUBMISSIONS

- 8 Directions were taken that the appeal be canvassed by way of written submissions. The same have been filed by Mugoye & Associates the Legal Counsel for the Appellants and Onyatta & Company Advocates for the Respondent dated 3/11/2025.

APPELLANTS SUBMISSIONS

- 9 The Appellant has distilled the grounds of Appeal herein into the following issues for determination; -
- 1) Whether the trial court erred in failing to recognise the Appellant's duly filed Defence, Witness Statement, and

- supporting documents filed via the court's authorized email address;
- 2) Whether the Appellant's right to a fair hearing under Article 50(1) of the Constitution was violated;
 - 3) Whether the trial court erred in allowing procedural technicalities to override substantive justice, contrary to Article 159(2)(d) of the Constitution; and
 - 4) Whether the judgment of the trial court ought to be set aside and the matter remitted for hearing afresh.
- 10 On whether failure to attach decree is fatal it is submitted that the use of the conjunction OR in Order 42 Rule 13 (4) (f) means that the Appellant is not mandatorily obligated to attach both the Judgment and the decree, as a decree is an extract of the judgment being appealed from. Further that the most immediate and available option in the event of failure to attach a decree appealed from is not striking out of the appeal; it is to refuse to hear the appeal unless and until the same is placed before the court by the Appellant herein. Reliance is placed on the case of **Elizanya Investments Limited V Lean Energy Solutions [2021] KEHC 8495 (KLR); Nyota Tissue Products V Charles Wanga & 4 Others [2020] EKLR and Dragon Fire Protection Limited V African Highlands Produce Co Ltd [2023] KEHC 1735 (KLR); Loopa & Another (Suing as The Legal Representative of The Estate of Stephen Ng'ulia (Deceased)) V Technoplast Ltd (CIVIL APPEAL E016**

OF 2021) [2022] KEHC 13597 (KLR) (6 OCTOBER 2022)

- 11 On issue No.1 it is submitted the practice of electronic filing was explicitly sanctioned and implemented by the Chief Justice's Practice Directions on Electronic Case Management, 2020, issued under Gazette Notice No. 2357 and which confirms that documents filed electronically, in accordance with the Judiciary's approved procedures, including transmission to the designated court email during the COVID-19 period, constitute a valid filing.
- 12 That the appellant transmitted her Defence, Witness Statement, and supporting documents through the court's official email address; such documents were duly filed within the meaning of the Practice Directions. That the registry by error failed to print and place hard copies in the file. The trial magistrate's insistence on the absence of a hard copy in the physical file, without verifying the corresponding electronic record, was therefore inconsistent with both the letter and spirit of the Chief Justice's Directions and Article 159(2)(d) of the Constitution, which obligates courts to administer justice without undue regard to procedural technicalities.
- 13 On issue No. 2 citing article 50 (1) of the Constitution of Kenya 2010 it is urged that every litigant, irrespective of the merits of their case, is entitled to be heard before an adverse decision is made against them. Reliance is placed on the Supreme Court decision of **Stephen Maina**

**Githiga -Vs- Kiru Tea Factory Company Limited -
Petition No. 13 OF 2019, Mbaki & Others V.
Macharia & Another (2005) 2 EA 206; Onyango Oloo
V. Attorney General [1986-1989] EA 456.** It is
contended that contrary to the principles of natural justice
and the right to a fair hearing, which is primarily anchored
in the Constitution, the Appellant was condemned unheard
after the trial court proceeded ex parte. Therefore,
judgment ought to be set aside ex debito justitiae to
preserve the integrity of the judicial process and restore
the Appellant's right to be heard.

- 14 On issue No. 3 it is submitted the learned trial
magistrate's decision not to reopen the pleadings or admit
the Appellant's properly filed witness statements, list, and
bundle of documents, despite clear evidence that they had
been filed correctly via the court's designated email
address and served on the 1st Respondent, amounted to
prioritizing a procedural technicality over the principles of
justice contrary to Article 159(2)(d) of the Constitution of
Kenya, 2010. Citing the case of **Nicholas Salat V IEBC &
6 Others**, CA (APPLICATION) NO. 228 OF 2013, it is urged
the right was modern approach is to sustain rather than
strike out pleadings on technical grounds
- 15 That it cannot be argued that the admission of the
Appellant's documents would have caused any prejudice
to the 1st Respondent, as the documents had already
been served well before the hearing.

- 16 On issue No. 4 it is urged that this court has the authority to order a new trial under the powers granted by Section 78(1)(e) of the Civil Procedure Act, which explicitly states that an appellate court has the power to order a new trial. This discretionary jurisdiction is exercised when the interests of justice demand it, especially when trial proceedings are affected by procedural irregularities or breaches of fundamental rights. Reliance is placed on the case **Obedi Kilonzo Kevevo V Republic [2015] EKLR and reaffirmed in Mutisya V Republic (CRIMINAL APPEAL E096 OF 2023) [2025] KEHC 3483 (KLR)**, on the guiding principles for ordering a retrial.
- 17 That a retrial is not an automatic remedy; it is an equitable measure to restore the integrity of the judicial process when the original proceedings were compromised. The court is referred to the case of **Patel V EA Cargo Handling Services Ltd [1974] EA 75**, on principles of setting aside a judgement.
- 18 Counsel emphasized that the original trial was flawed, and the only fair and just remedy is for this Honourable Court to quash the judgment of the trial court and remand the matter to the Principal Magistrate's Court at Bondo for a fresh hearing before a different magistrate

THE RESPONDENT'S SUBMISSIONS

- 19 The Respondents responded to the above grounds and raised a preliminary issue inviting the court to strike out the appeal for failure to attach a certified copy of decree.

They further identified the following issues for determination

- 1) Whether the appeal is barred by previous rulings and the doctrine of res judicata.
- 2) Whether the trial magistrate erred in declining to admit additional documents and witness statements.
- 3) Whether the trial magistrate properly evaluated the evidence and reached a lawful judgment.
- 4) Whether the trial magistrate acted without jurisdiction under Section 45 of the Law of Succession Act.

20 On issue 1) and 2) it is submitted that grounds 1-7 of the Memorandum of Appeal are a bid to re-open the case and introduce new evidence after the plaintiff had closed his case. That having chosen to seek review the appellant lost the right of appeal on the same matter. The appeal is said to offend section 7 and 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. The Court is referred to **National Bank of Kenya Ltd Vs. Ndungu Njau (1997) eKLR; Otieno Ragot & Co. Advocates Vs National Bank of Kenya (2020) eKLR and Poi-In (Kenya Ltd) Vs Habib Bank AG Zurich (1990) eKLR**

21 On Issue 3 covering grounds 8 to 18 it is submitted that the Appellant did not testify or produce any evidence to support her defence. The court was therefore entitled to find that the plaintiff's evidence stood uncontroverted. That without evidence from the Appellant there is no legal basis for this court to interfere.

- 22 On issue 4 it is submitted that the trial court exercised jurisdiction under the Environment and Land Court Act, which empowers subordinate courts to hear and determine disputes relating to ownership, use, and title to land. The court did not administer the estate but merely determined the legality of the subdivision and transfer of land.
- 23 On unintroduced documents it is urged that the Appellant's record now contains various documents and witness statements, none were ever introduced or admitted during the trial. Their later inclusion in the appeal record cannot retroactively convert them into evidence. That the Court is bound to consider only what was properly placed before the trial court. The appeal therefore remains unsupported by admissible evidence.
- 24 The court is invited to uphold the judgment of Hon. J. P. Nandi dated 31 May 2024 and costs of this appeal be awarded to the 1st Respondent.

ANALYSIS AND DETERMINATION

- 25 I have considered the record herein and the submissions by counsel. The following issues commend determination
- 1) Whether failure to attach copy of the decree is fatal to the appeal.
 - 2) Whether the appeal is barred by previous rulings and the doctrine of res judicata.

- 3) Whether the trial magistrate acted without jurisdiction under Section 45 of the Law of Succession Act.
- 4) Whether the trial magistrate properly evaluated the evidence and reached a lawful judgment.
- 5) What orders should issue
- 6) Who bears the costs of this appeal?

26 This is a first appeal. The Court of Appeal in **Peterson Ndung'u, Stephen Gichanga Gituro. N. Ojwang, Peter Kariuki, Joseph M. Kyavi & James Kimani V Kenya Power & Lighting Company Ltd [2018] Eklr** stated as follows regarding the duty of the first appellate court: -

“This being a first appeal , we are reminded of our primary role as a first appellate court namely to re-evaluate , re-assess and reanalyze the extracts on record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons why.....On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate itself and draw its own conclusions though it should always beware in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce

extraneous matters not dealt with by the parties in the evidence.....”

27 Also see **Giture vs Ngugi & Another ELC Appeal No. E001 Of 2023 (2024)** KEELC 6191.

28 The duty of an appellate court is stipulated under Section 78 of the Civil Procedure Act which states as follows;-

“Subject to such conditions and limitations as may be prescribed, an appellate court shall have power;

(a)to determine a case finally;

(b)to remand a case;

(c)to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

(2,) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

Whether failure to attach certified copy of decree is fatal to the appeal

29 This preliminary issue that has been raised by the Respondent in this appeal and therefore I must settle it at the earliest opportunity. It is contended that the Appellant has only attached to the Amended Record and Amended Supplementary Record of Appeal the Certified Copies of

the Proceedings and a copy of the Judgment, but no certified copy of the decree. As such, the Respondent contends that the absence of a Decree being appealed from renders the instant Appeal fatally defective per Order 42 Rule 13(4) of the Civil Procedure Rules

30 The Appellants submission is that the rule applicable to appeals to this Court provides under Order 42 rule 13 (f) of the Civil Procedure Rules for the filing of a copy of the judgment, order, or decree appealed from and does not mandate attaching both the judgment and the decree. It is not obligatory but conjunctive.

31 The provisions of Order 42 Rule 13(4) of the Civil Procedure Rules read as follows; -

1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.

2).....

3).....

4. Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

a) the memorandum of appeal;

b) the pleadings;

- c) the notes of the trial magistrate made at the hearing;
- d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.”

32 I have perused the Amended Record of Appeal as well as the Amended Supplementary Record of Appeal and it is true a copy of trial court decree is missing. I have also read the decisions of the court that have struck out an appeal for failure to attach a copy of decree. I take the position that it would be too draconian to strike out an appeal for failure to include a certified copy of a decree. Firstly, the decree arises out of the judgement and therefore as long as the judgement is part of the record of appeal the court can make reference and discern what the decree would entail. Moreover, this would not affect the substance of appeal. In reaching this conclusion the court is guided and persuaded by the following decisions; -

33 In the case of **Nyota Tissue Products V Charles Wanga & 4 Others [2020] EKLR. Justice Edward M. Muriithi** faced with a similar objection citing various authorities had this to say; -

'The rule applicable to the appeals to the High Court makes provision under Order 42 rule 13 (f) of the Civil Procedure Rules for the filing of a copy of the "judgment, order or decree appealed from" and does not make it mandatory to attach the judgment and the decree. The Record of Appeal herein attached the Judgment of the trial court according to the requirements of Order 42 rule 13 (4) (f) of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in **Silver Bullet Bus** case on the point, that it would be too draconian to strike out the appeal in these circumstances. With respect, I would agree that the dispensation of justice after the 2010 Constitution which provides for Article 159 (2) (d) principle of substantive justice without regard to technicalities of procedures calls for the court to permit an appeal the determination of which is possible because the Judgment appealed from is attached to the record of appeal but where the formal expression of the judgment has not been reduced into a decree of the court. And section 3A of the Civil procedure Act, which was the predecessor of the constitutional underpinning of the substantive justice provides significantly as follows:

"3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as

may be necessary for the ends of justice or to prevent abuse of the process of the court.”

10. Moreover, it is not a case of absent record of appeal in the sense of the premise of the Supreme Court in **Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR** at paragraph 41 set out above, that **“Without a record of appeal a Court cannot determine the appeal cause before it”** as the judgment of the trial court was attached in the record of appeal, and in the understanding of the procedure law, a decree is the formal expression of the judgment. In essence, the determination of the trial court which is the decision appealed from is fully set out in the judgment of that court, and it is that essence which the appellate court should consider in hearing the appeal. The court is not hindered by the lack of the formal expression of the decree if the full judgment of the trial court is exhibited in the record of appeal, and this is the essence of the Order 42 rule 13 (4) (f) of the Civil Procedure Rules, which requires attachment only of “judgment, order OR Decree appealed from.”

11. The rules of procedure must remain the maidens, and not mistresses, in the administration of justice, and justice is not a “cloistered virtue” in the

words of Lord Atkin (**Ambard v Attorney-General for Trinidad and Tobago [1936] AC 322, 335**) that **“justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful... comments of ordinary men”**. Ordinary men considering the striking of an appeal because of breach of a rule for attachment of the **decree** in addition to the **Judgment** of the Court, which is already exhibited in the Record of Appeal would find such a technical requirement a superfluity and an absurdity and make it difficult for them to respect such a position as a justice proposition.’

34 In the case of **Allen A. Lelekuti Vs Samuel Thumbi (2022) KEHC (KLR)** the court held thus; -

***‘I have considered the application and taking into the account the position that the current Appellant’s advocate has activated the appeal by filing the records of appeal which includes the judgment of the trial court, this court finds that the appeal should not be struck out on the basis of procedural technicality which does not go to the substance of the appeal. The Appellant is hereby granted leave to regularize the records and prosecute the appeal within the next three months. The Applicant will however have the costs of this application*’**

35 Also see the case of **Elizanya Investments Limited V Lean Energy Solutions [2021] KEHC 8495 (KLR)**.

Whether the appeal is barred by previous rulings and the doctrine of res judicata.

36 My perusal of the record shows two applications were made by the Appellant before the trial court on 4/9/2023 (see page 68-74 of the amended ROA) which was dismissed 15/12/2023 and another dated 11/3/2024 (see page 108 of amended ROA). In the former application the Appellant sought orders of stay of proceedings. Prayer c sought orders '.... Court be pleased to re-open the pleadings to enable the 1st Defendant/Applicant seek leave to file her list of Witnesses, Witness Statement, List and Bundle of Documents'; Prayer d sought '....in the alternative, ...court be pleased to grant leave to the 1st Defendant /Applicant seek leave to file her list of Witnesses, Witness Statement, List and Bundle of Documents'. Prayer e was to deem the said documents attached as duly filed upon payment of the requisite fees and thereafter recall the plaintiffs witness for further cross examination by the 1st defendant/Applicant. This application was dismissed in a reasoned ruling which this court has read.

37 The Notice of Motion dated 11/3/2024 and the substantive order sought was for review and or set aside Ruling made on 15/12/2023 which was also dismissed following a preliminary objection that the same was res judicata. The

trial court found that the same was res-judicata seeking for the same orders that had been sought in the earlier application. That it was a new application disguised as a review to seek the same remedy. The court struck it out vide a ruling dated 15/4/2024.

38 Counsel for the Appellant has placed considerable emphasis on Article 159 of the Constitution of Kenya 2010 urging that there was over reliance on procedural technicalities by the trial court which ought not to have been the case. That this court must not tread that path but uphold the right to be heard as guaranteed under article 50 of the same Constitution.

39 Article 159(2) reads; -

In exercising judicial authority, the courts and tribunals shall be guided by the following principles

—

- 1. justice shall be done to all irrespective of status;**
- 2. justice shall not be delayed;**
- 3. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);**
- 4. justice shall be administered without undue regard to procedural technicalities; and**

5. the purpose and principles of this Constitution shall be protected and promoted.

40 The above provisions have been used as a fall back by parties in urging the courts to disregard technical objections and uphold substantive justice and which has been a subject of many judicial pronouncements.

41 In **Hamisi v Tobiko & 2 others (Civil Appeal 154 of 2013) [2013] KECA 279 (KLR) (8 August 2013) (Judgment)** the Court of Appeal stated thus; -

'.... We do not consider Article 159 (2) (d) to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation'

42 The Supreme court of Kenya in the case of **Sawe v Independent Electoral & Boundaries Commission (IEBC) & 4 others (Petition 8 of 2014) [2015] KESC 7 (KLR) (22 July 2015) (Ruling)** emphasized that not all procedural deficiencies can be remedied by article 159 of the Constitution of Kenya 2010 and that Article 159(2)(d) of the Constitution was not a panacea for all procedural shortfalls. That not all procedural deficiencies could be remedied by article 159; and such was clearly the case, where the procedural step in question was a jurisdictional prerequisite.

43 Applying the above to the present appeal, it is my view that the dismissal of the application for leave to file documents was capable of an appeal to this court. The

appellant did not exercise her right of appeal. To me therefore this marked the end of that chapter. In any event the moment the Appellant preferred review, it then means the first order being the order dismissing the application for leave to file documents ceased to exist.

44 Additionally the order dismissing the application for review could also have been appealed against but likewise the Appellant did not exercise this right. It is my considered view that the issue cannot now be raised in the current appeal. The issues concerning these orders and submissions to that end are mislaid and misconceived. I see Counsel for the Appellant seeking to smuggle issues through the back door. I will not belabor the point.

45 The court will therefore not delve into the merits of the two applications.

46 What therefore concerns the current appeal is the judgement and decree of the trial court. This brings me to the three issues Whether the trial magistrate acted without jurisdiction under Section 45 of the Law of Succession Act; Whether the trial magistrate properly evaluated the evidence and reached a lawful judgment.

Whether the trial magistrate acted without jurisdiction under Section 45 of the Law of Succession Act;

47 This issue is drawn from ground No. 13 of the Memorandum of Appeal to the effect that the trial court

erred in law and fact by exercising jurisdiction it does not have contrary to section 45 of the Law of Succession Act.

48 Section 45 of the Law of Succession Act provides as follows: -

45. No intermeddling with property of deceased person

1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

2) Any person who contravenes the provisions of this section shall-

a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

- 49 Firstly, my perusal of the 1st Defendants Written Statement of Defence reveals that the 1st defendant admitted the jurisdiction of the trial court at paragraph 12 (page 9 of the Record of Appeal). Moreover, the submissions filed on behalf of the Appellant do not appear to have identified this as an issue for determination and is completely silent on the same.
- 50 Responding to the issue of jurisdiction it was submitted on behalf of the plaintiff respondent that the trial court exercised jurisdiction under the Environment and Land Court Act, which empowers subordinate courts to hear and determine disputes relating to ownership, use, and title to land. The court did not administer the estate but merely determined the legality of the subdivision and transfer of land.
- 51 Since the issue touched on jurisdiction the court must resolve it as it is trite that jurisdiction is everything and without it the court can do nothing - See the case of **Owners of Motor Vessel 'Lilian S' Vs Caltex Oil (Kenya) Limited 1989.** Furthermore, it has now been established that a point on jurisdiction may be raised at any stage of proceedings even at appeal when it had not been raised at the High Court - see the case of **Floriculture International Limited Vs Central Kenya Ltd & 3 Others (1995) eKLR** and **Kenindia Assurance Co. Ltd Vs Otiende (1989) 2KAR 162.**

52 The discourse of the jurisdiction of the High Court and the Environment and Land Court as it relates to succession of land belonging to a deceased person was settled by the Court of Appeal in the case of **Diasproperty Limited & Others Vs Githae & 10 Others (2024) KECA 318 KLR** where the court stated thus; -

36. Under Article 165(5)(b) of the Constitution, the High Court shall not have any jurisdiction in respect of matters within the jurisdiction of the Environment and Land Court. Under Article 162(2) of the Constitution and section 13 of the Environment and Land Court Act, 2012, all matters relating to land, its ownership, use, tenure, boundaries, and so on, are reserved for the Environment and Land Court.

37. It is notable that under Rule 43(1) of the Probate and Administration Rules, made under the Law of Succession Act, where, in succession proceedings, a party claiming that he was beneficially entitled to a parcel of land that the deceased left in his name, or there is a general dispute relating to the ownership of a parcel of land registered in the name of the deceased, such dispute has to be adjourned and be determined in originating summons in a separate court. It is when such a determination is made that the succession court can confirm the grant, bearing in mind the

determination. Of course, with the Constitution and the Environment and Land Court Act, such a dispute has to be referred to the Environment and Land Court for resolution.'

- 53 The plaintiff brought the suit as the legal representative and Administrator Ad Litem of the estate of John Mboga Ochola who died on 12/8/1998 having been the registered proprietor of the suit property as at 27/8/1996 and title issued on 9/7/1998. The plaintiffs claim against the 1st defendant is that the title was illegally and fraudulently subdivided to parcels Siaya/Omia Diere/ 3737 & 3738 after the proprietor died and illegally transferred to Adonijah (appellants husband since deceased) and John Mboga in 1999 without grant of letters of administration in respect of the deceased estate and disinheriting the sole surviving member of the deceased family of the part of the suit property.
- 54 The plaintiff averred that John Mboga Ochola did not participate or consented thereto. The plaintiff thus sought the reliefs in the plaint which I have outlined at the beginning of this judgement.
- 55 I see two limbs in the plaintiffs claim. Firstly, the claim that his grandfather's title was fraudulently subdivided post his death therefore without his participation and consent. Secondly there was the claim about the plaintiff being disinherited. This is well expressed at paragraph 7 of the Amended Plaint thus

'The plaintiff avers that life was very difficult for them and at one time in 1995 the church stepped in and built houses for the grandparents only for their grandfather to pass on in 1998 and the plaintiff sister in the year 2000. The plaintiff is the only surviving member of the family after the deaths of both the other sister and grandmother in 2015 and should not be unjustly and unfairly be disinherited.'

56 At paragraph 10 the plaintiff contends that following the fraud by the defendants he has suffered loss and damage and has been denied his right to access, inherit use and occupy the part of the suit property. The second limb on whether he is the sole surviving beneficiary and whether he was disinherited is to me a no-go zone for the trial court sitting on its jurisdiction donated by the Environment and land Act which was confined to matters relating to land, its ownership, use, tenure, boundaries,

57 However it is noteworthy that the orders sought in the plaint did not include an order that the plaintiff be declared as the sole surviving beneficiary and therefore entitled to the land. What was sought was declaration that the subdivisions were fraudulent and illegal, their cancellation and reversion to his grandfather and eviction. But I will later interrogate the orders issued and if they will stand the test of jurisdiction.

58 From the judgement the trial court identified the issue whether the late John Mboga Ochola owned the parcel

Siaya/Omia Diere/139 and made a positive finding based on a green card produced by the plaintiff.

- 59 The jurisdiction of magistrates' courts to handle land matters is founded under section 26 of the Environment and Land Court Act. The Magistrates' Court Act which is an Act of Parliament to give effect to provisions of the Constitution to confer jurisdiction, functions and powers on the magistrates' courts, provides that a Magistrate's Court shall, in the exercise of the jurisdiction conferred upon it by Section 26 of the Environment and Land Court Act and subject to its pecuniary limits, hear and determine claims relating to ownership of land inter alia. Moreover, the Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.
- 60 It is the finding of this court that the trial court was properly seized of jurisdiction and acted within the confines of the same to the extent that she pronounced herself on the legality of the subdivisions herein. Furthermore, the final orders of the trial court (see page 271 of the Record of Appeal) does not distribute the property to the plaintiff but reverted the parcel to its true original owner John Mboga Ochola. Up to this point I have no issue with these orders.
- 61 But what about the other orders issued by the trial court? I note that the trial court at paragraph 20 of the judgement (page 268 amended ROA) other than making a finding

that the titles were impeachable and ought to be cancelled the court additionally found as follows; -

'Further this court has already held and found that the Plaintiff is the legal owner of the suit property and it is only fair that the register be rectified to cure the fraud perpetrated by the Defendants and return the suit property to its rightfully owner whose ownership has not been disputed.'

- 62 My view remains that it is the plaintiff's grandfather who is the original owner of the land. I have already noted as long as the plaintiff was claiming he was disinherited as a beneficiary this was the province of the succession court to decide who are the rightful beneficiaries and then distribute the estate. Though the Chiefs letter 6/8/2020 confirms that the plaintiff is grandson of the deceased John Mboga Ochola however the grant issued was limited for purposes of filing this suit. He is not yet the administrator.
- 63 Should the orders for eviction have issued? The trial court in its judgement held that since the 1st defendants' titles have been found to be null and void and cancelled, the 1st defendant had no business remaining in the suit property. I have noted and confirmed in the Respondents submissions the court could only determine the initial ownership of the land and legality of the subdivisions herein to the deceased and 1st defendant's husband.

- 64 Moreover the 1st defendant in as much as she did not produce her documents there is a defence on record where she is clearly claiming a beneficiary interest in the suit property either by way of sale or occupation. Occupation as inferred from the orders of eviction, which in my view is against the estate of John Mboga Ochola. Keeping in mind that this is a deceased property having been reverted as such the interest claimed by the 1st defendant could be a liability (creditor) to the estate subject to confirmation by the Succession Court.
- 65 Consequently therefore I think the orders for eviction were premature and too draconian. This is also applicable to the orders of vacant possession. The process of succession ought to be exhausted by following the right procedure pursuant to the Law of Succession Act and the Probate & Administration Rules. At the point of the trial court judgement, the estate of the deceased has not yet been distributed and which is the preserve of the Succession Court and where the Appellant will still have an opportunity to ventilate her claim.
- 66 I will digress and state that it is only after the above and depending with the outcome that the estate can file suit for orders of eviction.
- 67 I will apply the same foregoing arguments with regard to the award of general damages for trespass the same are premature and unwarranted and should not have issued.

68 However with regard to the orders of permanent injunction I note the same ordinarily run concurrently with the orders of eviction and cannot be sustained in the circumstances of the case. However, the court is cognizant of the need to maintain the status quo on the suit property with a view to protecting the suit property from construction and developing by the appellant and 2nd defendant pending the distribution of the deceased estate by the succession court.

69 Having resolved the above I will then turn to the merits of the decision of the trial court.

Whether the trial magistrate properly evaluated the evidence and reached a lawful judgment

70 I must state at the outset that even in the absence of evidence being led by the adverse party the burden of proof lay on the plaintiff to prove his case to the required standard as envisaged under the provisions of Section 107 of the Evidence Act Cap 80 of the Laws of Kenya. In the case of **Susan Mumbi Versus Kefala Grebedhin; (Nairobi HCC NO. 332 OF 1993)** where Justice J. V. Juma had this to say; -

“The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the Plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial.”

- 71 The court has keenly studied the judgement of the trial court (page 259 -279). I have also gone through the proceedings and evidence adduced. The trial court based on the green card made a finding that the plaintiff had proved to the required standard that John Mboga Ochola was the owner of the parcel 139. Indeed, this is confirmed by the Green Card for parcel 139 which shows the register was opened on 27/9/1996 in the name of John Mboga Ochola. This also was not in dispute.
- 72 On allegations that the subdivisions and the transfer were fraudulently obtained the trial court was guided by the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR** and rightly so that fraud must be specifically pleaded, particularised and proved at a slightly higher standard of proof than that of a balance of probabilities. Trial court noted the particulars were pleaded at paragraph 9 of the plaint (as captured in the judgement at page 261 of the ROA).
- 73 The trial court was guided and rightly so by the case of **Munyu Maina vs Hiram Gathiha Maina (2013) KECA 94 (KLR)**, where the court of Appeal held that when one's root of title is challenged, they must defend its root and show that the title was acquired legally. The trial court further noted that burden lay on the defendants and found that they did not offer any evidence meaning they had not discharged the burden of proof. Analysing the green cards produced by the plaintiff and death certificate of John

Mboga Ochola who died on 12/8/1998 vis a vis the dates of the subdivisions to wit 14/4/1999 the trial court found thus ***'This clearly shows that at the time of the purported subdivision JOHN MBOGA OCHOLA had already died. This means that he did not participate in the subdivision and transfer of his land. I find that the plaintiff has been able to prove that the subdivision and subsequent transfer of the land was done illegally and fraudulently'***

- 74 This court also reviewed the plaintiff's case and the evidence he adduced before court. The Plaintiff testified as PW1. He produced Ex 1 - 8 namely Copy of Limited Grant Ad litem; Copy of death Certificate of John Mboga Ochola - deceased; Copy of search certificates of parcels Siaya/Omia Diere 3737 and 3738; Copy of green card Siaya/Omia Diere/139; Letter to Attorney General and Response; Chief's letter and copy of grant of administration to the 1st and 2nd defendants.
- 75 My review of the documents show that the Limited grant adlitem was issued in the Principal Magistrate Court at Bondo Succession Cause No. E 36 of 2020 to the plaintiff on 28/9/2020 for the deceased estate limited to filing suit until further representation is granted.
- 76 The Death Certificate confirms that John Mboga Ochola died on 12/8/1998 and clearly this was before the transfer of the suit to the 1st defendants' husband Adonijah. The Certificate of official search dated 18/6/2020 for parcel

Siaya/Omia Diere/3737 shows as at 14/4/99 John Mboga Ochola was registered proprietor which equally was after his death.

- 77 The Green Card for parcel Siaya/Omia Diere/139 shows the register was opened 27/9/1996 in the name of John Mboga Ochola and which was before John Mboga Ocholas death. A Title was issued on 9/7/98 which was also before John Mboga Ocholas death. Entry 3 on the said green card dated 14/4/99 shows the title was closed on subdivision to parcels 3737 & 3738 herein. The subdivision took place after John Mboga Ocholas death. The question arises how did this happen in his absence? Who gave instructions and or signed the mutations, who gave consent for the subdivision? Did he rise from the grave to do all this? Clearly this is irregular and illegal.
- 78 It is noteworthy that John Mboga Ocholas retained parcel 3737 for himself on 14/4/99 when he was infact long deceased. This is slightly above 8 months after his death. Someone must have clearly awaited for his death and which points to the person claiming they bought the other portion from him.
- 79 Additionally the Certificate of official Search for parcel 3738 shows Adonijah Nyadera the 1st Defendants husband as proprietor as at 14/4/99 (entry no. 2) and who was issued with title on even date (entry No.3). Again, this was after the proprietor's death. Why entry No.2. what

was in entry No.1? Could it have been John Mboga Ochola? I would pose the same questions posed earlier.

80 All the foregoing depicts illegality, irregularities and fraud and therefore the need to impeach the subdivisions as null and void and the need to revert them to the true owner.

81 In the case of **Elijah Makeri Nyangwara Vs Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B Of 2012** the court stated as follows: -

" ... it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions."

82 Arising from the foregoing it is my finding that indeed the trial court evaluated the evidence and reached the right finding that the subdivisions were marred with illegality and were fraudulent and were therefore null and void.

83 Pursuant to finding that the subdivision was illegal and fraudulent and observing that the law protects rights of the registered owner the trial court proceeded to impeach the title under the provisions of Section 26 of the Land Registration Act. My analysis above speaks to the above provisions.

84 The trial court further proceeded to determine that the titles should be cancelled and invoked the powers conferred under **Section 80** of the Land Registration Act which empowers the Court to order rectification of the register where registration is obtained by fraud or mistake. Indeed, the title had to be reverted to the true owner and further a title obtained illegally and unprocedural cannot be accorded the protection of article 40 of the Constitution of Kenya 2010 - see **Dina Management Limited vs. County Government of Mombasa & 5 others [2023] KESC 30 (KLR)** where the Supreme Court of Kenya stated thus; -

Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired.

85 Based on the foregoing I find no reasons to overturn the trial court findings except on the orders of eviction and

vacant possession, general damages. I will replace orders of permanent injunction with the orders of status quo.

86 This appeal partially succeeds and is disposed in the following terms; -

- 1) The Judgement and decree of the trial court is upheld in respect of orders a), b), C), d) and i)
- 2) The judgement of the trial court is overturned in respect of orders e), f), g), and h).
- 3) That an order of status quo hereby issues against the Appellant and 2nd defendant either by themselves, agents, and or servants from further construction and or developing the suit property **Siaya/Omia Diere/3737&3738** or plot No Siaya Omiya Diere/139 pending the distribution of the estate of John Mboga Ochola (deceased) by the Succession court when this order shall automatically terminate.
- 4) There shall be no orders as to cost on this appeal.

DATED at **SIAYA** this 27th Day of April 2026

HON. JUSTICE A. E. DENA

JUDGE

27th/04/2026

**Judgement delivered virtually through Microsoft Teams
Video Conferencing Platform in the Presence of:**

Mr. Barack for the Appellants

Onyatta for the for respondents

Court assistant: Dorothy Owuor

ORIGINAL