

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELCLA NO. E006 OF 2025

JOSEPH OUMA RASOWA..... APPELLANT

-VS-

DEVERELL OCHIENG PAUL (Sued as the
Administrator of the estate of PAUL

OCHIENG AKUKU -Deceased)1ST RESPONDENT

LOLWE HOUSING COOPERATIVE SOCIETY2ND RESPONDENT

LAND REGISTRAR – KISUMU 3RD RESPONDENT

ATTORNEY GENERAL4TH RESPONDENT

***(Being an Appeal from the Judgement and Decree of the Senior
Principal Magistrate at Winam, Hon. Robert M. Oanda delivered on
the 15th August, 2024, in WINAM SPMC EL CASE NO. E005 OF 2022)***

IN

DEVERELL OCHIENG PAUL PLAINTIFF

VERSUS

JOSEPH OUMA RASOWA.....1ST DEFENDANT

LOLWE HOUSING COOPERATIVE SOCIETY..... 2ND DEFENDANT

LAND REGISTRAR – KISUMU 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

J U D G E M E N T

Background

1. A brief background of the appeal herein, as can be gathered from the record of appeal dated 13th May, 2025, is that the

Appellant herein was the 1st Defendant and the 1st Respondent, the Plaintiff in Winam SPMC ELC NO. E005 OF 2022, (herein referred to as the suit). From the plaint on page 5 of the record of appeal, it is evident that the Respondent sued the Appellant together with Lolwe Housing Co-operative Society Limited, the Land Registrar, Kisumu, and the Attorney General in respect of a parcel of land known as plot 325 situate within Lolwe Estate, Kisumu (the suit land). The Respondent's case in the suit was that he is the son and administrator of the estate of Paul Ochieng Akuku, deceased, who owned 150 shares.

2. That the 1st, 2nd, and 3rd Defendants had fraudulently colluded to have the suit land registered in the name of the 1st Defendant (appellant herein) after the death of Paul Ochieng Akuku, deceased. The particulars of fraud pleaded were: causing the removal of the name of the Plaintiff's father, the 2nd Defendant signing documents to change ownership, and the 3rd Defendant causing registration into the name of the 1st Defendant.
3. The 1st Respondent pleaded that by reason of the actions of the Defendants, the estate of Paul Ochieng Akuku, deceased,

had been deprived of quiet enjoyment and possession of plot No.325. He therefore sought the following relief;

- a) A declaration that the Plaintiff's father, Paul Ochieng Akuku, is the bona fide owner of plot number 325 and an order that the 1st Defendant be removed from the register by the 3rd Defendant.
- b) Costs of the suit.
- c) Interest at court rates
- d) Any other relief the Honourable court may deem fit and just to grant.

4. The record shows that in response to the 1st Respondent's claim, the Appellant filed a Statement of Defence dated 16th June, 2022, vide which he denied the Respondent's claim. He averred that he was the registered proprietor of the suit land vide certificate of lease, that the allocation of the suit land, and the subsequent issue of a certificate of lease to him were done lawfully and in accordance with the laid down procedures governing such transactions. He averred further that he has been and still is in occupation of plot number 325. The Appellant objected to the jurisdiction of the court and

averred that the suit should have been filed at the Co-operatives Tribunal.

5. The 3rd and 4th Defendants in the suit filed a statement of defence dated 7th June, 2022. They admitted the jurisdiction of the court but denied the 1st Respondent's claim.
6. The record shows that the suit was heard before the trial court, which vide the judgement dated 15th day of August, 2024, found that the Plaintiff (1st Respondent herein) had proved his case against the Defendant and entered judgment in favour of the 1st Respondent and against the Appellant and the rest of the Defendants in the suit in terms of prayer (a) of the plaint. Each party was directed to bear its own costs of the suit.

The appeal

7. Aggrieved by the judgment, the Appellant preferred the present appeal vide the Memorandum of Appeal dated 31st January, 2025, on the grounds that;

- (1) The Learned Trial Magistrate erred in law and in fact in making a finding that the Appellant did not prove his case on a balance of probability as required in civil cases.

- (2) The Learned Trial Magistrate erred in law and in fact in holding that the 1st Respondent's father, Paul Ochieng Akuku (deceased), is the bona fide owner of Kisumu/Mun/Block 14 parcel number 325.
- (3) The Learned Trial Magistrate erred in law and in fact in finding that the 1st Respondent proved the allegation of fraud on the part of the Appellant towards acquisition of Kisumu/Mun/Block 14 parcel 325.
- (4) The Learned Trial Magistrate erred in law and in fact by failing to adjudicate upon or ignoring the major issue raised by the Appellant and thereby arriving at a wrong decision.
- (5) The Learned Trial Magistrate erred in law and in fact in making a finding that the Respondent has proved their case when there was no evidence to support that position.
- (6) The Learned Trial Magistrate was in his judgement manifestly biased against the Appellant by failing to consider and weigh the Appellant's evidence as against the Respondents' evidence and the

circumstances of the case, thus arriving at a wrong decision.

(7) The Learned Trial Magistrate misdirected himself in treating the facts and evidence before him superficially and consequently came to a wrong conclusion on the same.

(8) The Learned Trial Magistrate erred in law and in fact in exercising his judicial authority in a manner that was sympathetic, benevolent, whimsical, and capricious, thus occasioning prejudice and injustice.

8. The Appellant seeks orders that;

(a) The appeal be allowed.

(b) The judgment and decree of Hon. Robert M. Oanda dated and delivered on 15th August, 2024, be set aside in its entirety.

(c) The costs of the appeal be granted to the Appellant.

Submissions

9. The appeal was heard by way of written submissions. On behalf of the Appellant, written submissions dated 2nd December, 2025, were filed by Ngala Awino & Company Advocates. Counsel submitted that the Appellant had

produced a Share Certificate dated 15th April, 2005, showing that indeed he was a member of Lolwe Housing and Co-operative Society Limited and had the Society translate his shares to a certificate of lease. That the Appellant is protected by Article 40 of the Constitution of Kenya 2010 and section 26 of the Land Registration Act. Counsel submitted further that the Appellant procedurally and legally acquired the certificate lease, and no tangible evidence was adduced by the 1st Respondent to warrant cancellation of the said certificate of lease. Counsel relied on the case of Chemei Investment Limited -vs- the Attorney General & Other Nairobi petition No.94 of 2005, and the case of R.G. Patel -vs- Lalji Makaru, cited in Gladys Wanjiru Ngacha -vs- Teresa Chapsaat & 4 Others [2013]KFCA 29(KLR) on the standard of proof of allegations of fraud.

10. On whether it was proper for the trial court to cancel the certificate of lease held by the Appellant, Counsel submitted that it was clear from the evidence supplied that the Appellant was the registered lessee of the suit land. That under section 80(2) of the Land Registration Act, the register in respect of land shall not be rectified to affect the title of a proprietor who

is in possession and acquired the land for valuable consideration unless such proprietor knew of the omission, fraud or mistake in consequence of which the rectification is sought or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default. That the 1st Respondent had failed to prove any element of fraud on the part of the Appellant; hence, the same could not warrant cancellation of the certificate of lease held by the Appellant. Counsel urged the court to allow the appeal with costs.

11. On behalf of the 1st Respondent, written submissions dated 2nd March, 2026, were filed by William O. Ochuka, Advocate. Counsel submitted that the trial Magistrate rightly impeached and cancelled the Appellant's title to the suit property for reasons that it was obtained fraudulently. That the share certificate of the deceased Paul Ochieng Akuku was issued earlier than that of the Appellant. That the serial number of the share certificate of the deceased was 3308, and that that of the Appellant purportedly issued 15 years later was also 3308. That this was outright fraud. That the

latter share certificate was obtained fraudulently, irregularly, and through a corrupt scheme and was a forgery.

12. That the deceased died on 22nd February, 1994, and his shares were comprised in plot No. KISUMU/MUNICIPALITY BLOCK 14/325/PLOT 325. That the only way the Appellant could have acquired shares and the property indicated therein was by transmission. That however, no succession proceedings were undertaken.

13. That the Appellant did not prove how the certificate of lease was transferred to him. That the protection in the Constitution does not extend to any property that has been found to have been unlawfully acquired. Counsel relied on the provisions of section 26(1)(a) and (b) regarding the grounds upon which title to land may be impeached. Counsel also relied on the cases of *Igainya Ltd & 2 Others -vs- Githae & 5 Others [2026] KECA 252 (KLR)* and *Kingori -vs- County Government of Nairobi & 2 Others (Civil Appeal 254 of 2019) [KECA] 62 (KLR)* on the cancellation of illegally acquired title to land.

14. On whether it was proper for the trial court to cancel the certificate of lease held by the Appellant, Counsel submitted

that the Appellant had failed to produce transfer instruments, receipt of stamp duty payment, requisite consent, and a letter from the 2nd Respondent. That it was not enough to dangle a title. That the Appellant's title irredeemably failed to pass the test under section 26 (a) and (b) of the Land Registration Act. Counsel relied on the provisions of section 80(1) of the Land Registration Act on rectification of the register by the court.

15. On whether the 1st Respondent had proved his case before the trial court, Counsel submitted that the 1st Respondent had proved on a balance of probabilities that his deceased father, one Paul Ochieng Akuku, was the bona fide owner of the suit land. That he produced a share certificate showing that parcel number Kisumu Municipality Block 14/325 (Plot No.325) was allocated to Paul Ochieng Akuku (deceased) on 1st September, 1990. That the 1st Respondent also produced a receipt showing that the deceased paid Kshs. 9390. Counsel urged the court to dismiss the appeal with costs to the 1st Respondent.

Analysis and determination

16. This is a first appeal, and as such, the court has a duty to re-analyze and re-examine the evidence adduced and be able

to reach its own independent conclusion in the matter. In the case of *Selle and another vs Associated Motor Boat Company Ltd and others 1968 E.A 123* it was held that:

“An appeal to this court from a trial by the High Court is by way of a 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 conclusions, though it should always bear in mind that it has never seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not necessarily bound to follow the trial court’s findings of fact if it appears either that he clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

This position applies in respect of appeals from the subordinate courts to the High Court and Courts of Equal Status as well. (See also *South Nyanza Sugar Company Ltd vs Simeona A. Opala[2020]eKLR.*)

17. The first ground of appeal faults the trial court in making a finding that the Appellant did not prove his case on a balance of probabilities. From the record, the Appellant was the 1st Defendant in the suit. He had no case in the suit. He did not file

a counterclaim. He only defended himself against the 1st Respondent's suit by denying the 1st Respondent's claim and stating that he was the lawfully registered owner of the suit land and that he was in occupation of the land. I have read the judgment and find no finding by the trial court that the Appellant had not proved his case on a balance of probabilities as required in Civil cases. Ground 1 of the appeal has not been proved.

18. Ground 2 of the appeal faults the trial court for holding that the 1st Respondent's father, Paul Ochieng Akuku, deceased, is the bona fide owner of Kisumu Municipality/Block 14/Parcel Number 325. A reading of the judgment shows that the trial court concluded that;

“From the evidence on record, there seems to be a problem which was either orchestrated by the 1st Defendant and other parties, which led to this. The Plaintiff (1st Respondent herein) has a genuine concern, and it is not clear how the 1st Defendant (Appellant herein) got to be registered as the proprietor of the suit property.”

The court then, relying on section 26 of the Land Registration Act, proceeded to find that the 1st Respondent had proven his case against the Defendants.

19. It was the 1st Respondent's case, as pleaded in paragraph 6 of the plaint, that the deceased was member number No. 413 and owned 150 shares. The proceedings before the trial court show that the 1st Respondent, who testified as PW1, adopted the contents of his witness statement as his evidence in chief. He had stated in the witness statement filed on 24th February, 2022, that the deceased had bought the suit land No.325 in 1990 from Lolwe Housing Society Limited and was issued with a share certificate. That when the 1st Respondent conducted search, he discovered that the land had been registered in the name of the Appellant on 27th March, 2012. That he filed the case so that the court can order the cancellation of the lease to the Appellant and to reinstate the name of Lolwe Housing Co-operative, which should transfer the land to the deceased for the benefit of the deceased's beneficiaries.

20. The 1st Respondent produced exhibits, including a receipt for payment of Kshs.9390 being payment for membership,

150 shares, land rent, survey fees, and membership card, he produced share certificate No.3308 for 150 shares in Lolwe Housing Co-operative Society Ltd in favour of the deceased, a copy of the register in respect of L.R. No. KISUMU MUNICIPALITY/BLOCK 14/325 measuring 0.0299 Ha and a demand letter dated 11th October, 2019, addressed to the Manager, Lolwe Housing Co-operative Society Limited.

21. The record shows that the 1st Respondent called 2 witnesses. PW2, Jaffrey Ochieng Ouko, rehashed the contents of PW1's statement. PW3 was Felicity Rose Akuku, a child of the deceased, who stated that the claim was in respect of land which belonged to her father.

22. I have keenly read the share certificate and payment receipts produced by the 1st Respondent before the trial court. All that they show is that the deceased was a member number 413 of the 2nd Respondent Co-operative Society holding 150 shares thereof.

23. Although the 1st Respondent and his witnesses claimed that the deceased had bought the suit land from the 2nd Respondent in the year 1990, no evidence of purchase was exhibited. No sale agreement or acknowledgement of

payment of the purchase price was produced. The copy of the register (green card) exhibited shows that the suit land came into existence in the year 2012 when the register in respect thereof was opened on 15th March, 2012, and the land was registered in the name of the 2nd Respondent and later on 27th March, 2012, transferred in favour of the Appellant.

24. It is not possible that the deceased could have bought land parcel No.325 in the year 1990, before the parcel of land was registered. The parcel number 325 is not indicated on the share certificate or payment receipt produced by the 1st Respondent.

25. The Appellant, on the other hand, pleaded in paragraph 6 of his Statement of Defence that he was the registered proprietor of plot No.325 and that the allotment of the land and issuance of a certificate of lease to him were done lawfully.

26. The proceedings show that the Appellant testified as DW1 and stated vide his witness statement dated 4th May, 2023, that there was no nexus between the share certificate held by the deceased and the Appellant's title to the suit land. He produced, among other documents, a certificate of lease

dated 27th March, 2012, in respect of the suit land in his favour for a period of 99 years from 1st June, 1985. This information aligns with or is supported by the information on the copy of the register (green card) produced by the 1st Respondent.

27. From the foregoing, this court finds that the findings of the trial court that the 1st Respondent had a genuine concern and that the 1st Respondent had proven his case were not supported by the evidence placed before the court. Of the two contesting parties, it was the Appellant who was the registered owner of the land. He held a lease in respect of the land. The 1st Respondent had no document of title or ownership of the land.

28. The trial court relied on section 26 of the Land Registration Act for purposes of emphasizing that title to land can be impeached where it is proved that the same was procured by fraud, misrepresentation, or illegally through a corrupt scheme. However, the court failed to consider the sanctity of title as provided in sub-section (1) thereof that:-

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or

transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions, and conditions contained or endorsed in the certificate.”

29. On sanctity of title in Civil Appeal No. 246 of 2013 between Arthi Highway Developers Limited - Vs - West End Butchery Limited and Others, the Court of Appeal expressly stated that the law on fraud and indefeasibility of title had been settled. The Court referred to the law as stated in the case of Dr. Joseph Arap Ngok - Vs - Justice Moiwo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997, where the Court held that:

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of the title bestowed upon the title holder under the Act. It is our law, and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title; otherwise, the whole process of registration of Titles and the entire system in relation to

ownership of property in Kenya would be placed in jeopardy.”

30. The documents placed before the trial court demonstrated no nexus between the suit land and the 1st Respondent’s claim. I find that the trial court did err in failing to uphold the sanctity of the title/lease held by the Appellant.

31. Ground 3 of the appeal faults the trial court for finding that the 1st Respondent had proved the allegations of fraud on the part of the Appellant in the acquisition of the suit land. Black’s Law Dictionary, 10th Edition, defines the term “fraud” as: “Knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.”

32. One of the findings of the trial court was that from the evidence on record, there seems to be a problem which was either orchestrated by the 1st Defendant (appellant herein) and other parties. Citing section 26 of the Land Registration Act, the trial court proceeded to point out that a certificate of lease and/or title deed may be impeached by reason of fraud, misrepresentation, or if the same was acquired illegally or through a corrupt scheme. The court found that “this may be the position here.”

33. The record shows that the 1st Respondent had pleaded in paragraph 9 of the plaint that registration of the suit land in the name of the Appellant was procured by fraud. The record also shows that the Appellant denied the allegation of fraud. The burden of proof was therefore under the provisions of sections 107, 109, and 112 of the Evidence Act, with the 1st Respondent to prove to the required standard that indeed the registration was by fraud.

34. Although the 1st Respondent pleaded particulars of fraud, no evidence was adduced to prove the same. The standard of proof for fraud is higher than proof on a balance of probabilities required in civil cases. In Susan Nyokabi Ngoci & another v Kimson Holding Limited & another [2015] KEELC 719 (KLR), the court held that;

“Thirdly, the burden was always on the Plaintiffs to prove fraud on the part of the Defendants. The standard of proof where fraud is alleged is high. Though it is the same civil standard of proof on a balance of probabilities, it is certainly higher than the ordinary proof on a balance of probabilities but lower than proof beyond a reasonable doubt. It all depends on the nature of the issue and its gravity: see Hornal v- Neubeger Production Ltd [1957] 1 QB 247. Evidence of especially high strength and quality is required to meet the civil standard of proof in fraud cases. It is more burdensome: see also the cases

of *Mpungu & Sons Transporters Ltd -v- Attorney General & another* [2006] 1EA 212. ."

Also in *re Estate of Francis Waita Mbaki (Deceased)* [2018] eKLR, the court held that "Fraud requires a higher degree of cogency of evidence on the balance of probability test to prove. I agree with the following passage from the decision of Kneller J. (as he then was) in *Mutsonga v Nyati* [1984] KLR 425, 439, "The next issue is whether or not the defendant had the parcel registered in his name fraudulently? Charges of fraud should not be lightly made or considered. *Mason v Clarke* [1955] AC 778, 794; *Bradford Building Society v Borders*, [1941] 2 All ER 205. They must be strictly proved, and although the standard of proof may not be so heavy as to require beyond a reasonable doubt, something more than a mere balance of probabilities is required. *Ratilal Gordon bhai Patel v Lalji Makanji*, [1957] EA 314 (CA-T). In fact, a high degree of probability is required. *Hornal v Neuberger Products Limited*, [1957] QB 247, 258. It is very much a question for the trial judge to answer. *Gross v Lewis Hilman*, [1970] Ch 445 (CA). See generally Clerk & Lindsell on Torts, 15th ed, [1982] pages 853, para 17-20. Whether there is evidence to support an allegation of fraud is a question of fact. *Ludgater v Love* (188), 44 LT 694 (CA). Halsbury's Laws of England, Vol 26, Third Ed, [1959] page 845, para 1572."

35. In the absence of such evidence, I find that there was no basis for the trial court to find that fraud had been proved. Ground 3 of the appeal has been proved. The trial court erred

in finding that registration of the suit land in favour of the Appellant was procured by fraud.

36. The 4th, 5th, 6th, 7th, and 8th grounds of appeal fault the trial court in the manner it handled the evidence placed before it and in making a finding that the 1st Respondent had proved his case on a balance of probabilities, which finding was not supported by the evidence placed before the court.

37. Having carefully re-examined and re-analyzed the evidence as I am bound to do as a court handling a first appeal, I find that the trial court erred in its findings and ultimate decision. I find reason to interfere with the finding and decision of the court. I find that the appeal has merit and hereby allow it.

38. The result is that

- i. The judgment of the trial court in WINAM SPMC EL CASE NO E005 OF 2022 dated 15th August 2024 is hereby set aside and replaced with a judgment dismissing the 1st Respondent's suit.**
- ii. Costs of the appeal are awarded to the Appellant.**

Orders accordingly.

**Judgment dated and signed at Kisumu and delivered
virtually this 7th day of May, 2026.**

**E. ASATI,
JUDGE.**

In the presence of:

Atika: Court Assistant.

Odah for the Appellant.

Ochuka for the 1st Respondent.

N/A for the 2nd, 3rd and 4th Respondents.