



Ongele (Suing as the Administrator of the Estate of the Late Maricus Ongele Chore (Deceased)) v Odhiambo & another (Environment and Land Case 48 of 2012) [2025] KEELC 5555 (KLR) (24 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5555 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE 48 OF 2012**

SO OKONG'O, J

JULY 24, 2025

BETWEEN

**MATHEW WAMBARE ONGELE PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE MARICUS
ONGELE CHORE (DECEASED)**

AND

**GEORGE BERNARD ODHIAMBO 1ST DEFENDANT
JUMA MUCHEMI 2ND DEFENDANT**

JUDGMENT

1. The Plaintiff instituted this suit against the Defendants through a plaint dated 22nd August 2012, which was filed on 10th September 2012. The Plaintiff averred that at all material times to this suit, Maricus Ongele Chore, deceased (hereinafter referred to as “the deceased”), was the equitable owner of all that parcel of land known as Title No. Kisumu/Chiga/221 (hereinafter referred to as “the suit property”), which was later subdivided by the 2nd Defendant (sic) into twelve (12) portions namely, Title No. Kisumu/Chiga/3182, Title No. Kisumu/Chiga/3183, Title No. Kisumu/Chiga/3184, Title No. Kisumu/Chiga/3185, Title No. Kisumu/Chiga/3186, Title No. Kisumu/Chiga/3187, Title No. Kisumu/Chiga/3188, Title No. Kisumu/Chiga/3189, Title No. Kisumu/Chiga/3190, Title No. Kisumu/Chiga/3191, Title No. Kisumu/Chiga/3192 and Title No. Kisumu/Chiga/3193 (hereinafter together referred to as “subdivisions of the suit property”).
2. The Plaintiff averred that upon the death of the deceased on 27th September 1990, the Plaintiff, together with the other beneficiaries of the estate of the deceased, inherited the suit property and continued residing thereon until the 1st Defendant showed up in 2011 claiming ownership of the same. The Plaintiff averred that he was the surviving son of the deceased who died intestate on 10th July 1990 (sic)



and thus the rightful owner of the suit property. The Plaintiff averred that on 14th December 1982, before the death of the deceased and through fraudulent means, the 2nd Defendant caused himself to be registered as the owner of the suit property, yet the 2nd Defendant had never set foot on the said property.

3. The Plaintiff averred that the 2nd Defendant, without the knowledge of the Plaintiff and the beneficiaries of the estate of the deceased fraudulently transferred the suit property to the 1st Defendant who later fraudulently subdivided the suit property into twelve portions. The Plaintiff averred that the 1st Defendant had threatened the Plaintiff and his family with eviction from the suit property. The Plaintiff averred that the actions of the Defendants were immoral and illegal. The Plaintiff averred that following the discovery of fraud, he complained to the District Land Registrar who cautioned the Defendants about the fraudulent transactions but the Defendants had not heeded his advice to stop the threats of eviction against the Plaintiff.
4. The Plaintiff prayed for judgment against the Defendants jointly and severally for;
 1. A declaration that the registration of the 2nd Defendant as the first owner of Title No. Kisumu/Chiga/221 was fraudulent and illegal.
 2. A declaration that the transfer of Title No. Kisumu/Chiga/221 by the 2nd Defendant to the 1st Defendant and the subsequent subdivision of the same into twelve (12) portions, namely, Title No. Kisumu/Chiga/3182, Title No. Kisumu/Chiga/3183, Title No. Kisumu/Chiga/3184, Title No. Kisumu/Chiga/3185, Title No. Kisumu/Chiga/3186, Title No. Kisumu/Chiga/3187, Title No. Kisumu/Chiga/3188, Title No. Kisumu/Chiga/3189, Title No. Kisumu/Chiga/3190, Title No. Kisumu/Chiga/3191, Title No. Title No. Kisumu/Chiga/3192 and Title No. Kisumu/Chiga/3193 was unlawful and irregular.
 3. An order directing the Kisumu District Land Registrar to cancel the subdivision of the suit property and restore the suit property in the name of the deceased.
 4. A permanent injunction restraining the Defendants, their agents, workers and/or whomsoever jointly and severally from evicting the Plaintiffs, subdividing, selling, transferring, charging and/or interfering with the suit property.
 5. Costs of the suit plus interest.
 6. Any other relief the court shall deem fit to grant.
5. The Defendants entered an appearance and filed a joint statement of defence on 5th October 2012. The Defendants denied all the allegations made against them in the plaint, save as admitted. The 1st Defendant averred that he obtained an eviction order in Winam PMCC No. 120 of 2010, George Omondi v. Tom Arianda and Others (hereinafter referred to as “the lower court suit”). The 1st Defendant averred that the said eviction order was obtained legally.
6. The Defendants averred that this suit was res judicata, frivolous, and vexatious, as the issues raised in the suit had been determined in the lower court suit. The Defendants averred that the suit was time-barred under the provisions of Sections 7 and 9 (2) of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. The Defendants prayed that the suit be dismissed with costs. The Plaintiff filed a reply to defence on 17th October 2012, in which he joined issue with the Defendants in their statement of defence save for the admissions.
7. At the trial, the Plaintiff, Mathews Wambare Ongele (PW1) gave evidence and called three witness. The Plaintiff told the court that he was the son and the administrator of the estate of Maricus Ongele Chore,



- deceased. He adopted his statement filed together with the plaint as part of his evidence in chief and produced the documents attached to his list of documents filed on 10th September 2012 together with the plaint as P.EXH. 1 to 12 respectively. The Plaintiff told the court that the suit property belonged to his grandfather, Andrew Chore. He stated that when his grandfather died, he left the land to his father, Maricus Ongele Chore, deceased. He stated that when the deceased died, he left the land to him to take care of. He told the court that before the death of the deceased, the deceased had discovered that the suit property had been transferred to another person. He stated that the deceased reported the matter to the District Officer (D.O) at Winam, but the D.O had not resolved the dispute as at the date of the death of the deceased. He told the court that after the death of the deceased, one Moses Muchemi, the son of the 2nd Defendant, came and claimed that the deceased had sold to him the suit property.
8. The Plaintiff stated that the 1st Defendant subsequently came and claimed the suit property. The Plaintiff stated that the Defendants acquired the suit property unlawfully. He stated that the suit property had since been subdivided. He stated that the houses belonging to his brother and sister-in-law, which were on the suit property, were demolished. He stated that his step-brother, whose house was not demolished was the one who was occupying the suit property.
 9. On cross-examination by the Defendants' advocate, the Plaintiff stated as follows: The deceased, Maricus Ongele Chore died on 27th September 1990. According to the certificate of official search dated 22nd January 2008, the suit property was registered in the name of the 2nd Defendant on 14th December 1983 before the death of the deceased. They did not know how the suit property was registered in the name of the 2nd Defendant when the deceased was still alive. The deceased took action against the said registration in 1990 by lodging a complaint against the 2nd Defendant at the D.O's office. The 2nd Defendant was summoned by the D.O. The deceased died in September 1990 before he filed a suit. The letter dated 10th July 1990, addressed to the 2nd Defendant by the D.O, followed the deceased's complaint. The other parcels of land, Plot No. 230 and Plot No. 258, mentioned in the letter, were registered in the names of some Asians whom they had never seen. The dispute was not resolved by the D.O.
 10. The Plaintiff stated further that he referred the matter to the Land Disputes Tribunal (the Tribunal) in 2010. The Tribunal dismissed his complaint. This suit was the first one filed by him as the administrator of the estate of the deceased. The 1st Defendant had filed the lower court suit (Winam Civil Suit No. 120 of 2010). The suit was against those who were occupying the suit property. He was not a party to that case. The 1st Defendant sought the eviction of the Defendants in that case from the suit property. Judgment was delivered in the lower court suit on 2nd August 2012. He was dissatisfied with the judgment. The Defendants in the lower court case were his cousin, brother and sister-in-law. Andrew Odhiambo Ongele and Sypros Ogutu were evicted following the judgment. Tom Arianda was still on the suit property. The Defendants in the suit filed an appeal in 2012. It was the same year that he filed the present suit.
 11. The Plaintiff stated further that when he was filing this suit, he was aware of the decision in the lower court suit. He was a witness in that suit as the administrator of the estate of Maricus Ongele Chore. He did not know how the appeal ended. He had evidence from the land adjudication department showing that the suit property belonged to his father and that the name of his father was cancelled in the adjudication record following an alleged successful objection by the 2nd Defendant, which his deceased father was not aware of. His father never appealed to the Minister.
 12. On re-examination, the Plaintiff stated that he was not aware of the adjudication proceedings. He stated further that the 2nd Defendant never occupied the suit property and that his deceased father told him that he never sold the suit property to anyone. On examination by the court, the Plaintiff stated that



- the deceased owned all three parcels, Plot Nos. 221, 230 and 258 mentioned in the D.O's letter dated 10th July 1990. He stated that they had not filed suits with regard to Plot Nos. 230 and 258 due to lack of money.
13. The Plaintiff's second witness was Syphrosa Akinyi Mbede (PW2). PW2 adopted her witness statement filed on 24th July 2018 as her evidence in chief. On cross-examination by the Defendants' advocate, PW2 stated that she was a party to the lower court suit and after the judgment in that case, she was evicted from the suit property and all her houses on the land were demolished. She stated that she had been tilling the suit property and that she was staying in the neighbourhood of the suit property on land that she was given by a well-wisher. She stated that the suit property belonged to her father-in-law.
 14. The next witness was Tom Odhiambo Kano (PW3). PW3 adopted his witness statement filed on 24th July 2018 as his evidence in chief. On cross-examination by the Defendants' advocate, PW3 stated that he was the Plaintiff's cousin. He stated that Maricus Ongele Chore, deceased, was his uncle. He told the court that the suit property did not belong to his family, but he was in occupation of the same. He stated that the land belonged to Ongaya Lijiri and Ongele Chore, who were brothers. He stated that Ongaya Lijiri sold him his share of the land in 2006. He stated that in 2006, the land was in the name of Ongele Chore, although he had not done a search to confirm that. He stated that he was in occupation of the suit property, but he had no document showing that he had purchased a portion of the property.
 15. The Plaintiff's next and last witness was Andrew Okoth Ongele (PW4). PW4 adopted as his evidence in chief his witness statement filed on 24th July 2018. On cross-examination by the Defendants' advocate, PW4 stated that the Plaintiff was his brother. He stated that they were sons of Maricus Ongele Chore, deceased. He stated that he was living in a rented house. He stated that he started living on the suit property in 2000 and PW3 joined him around 2006. He stated that he was evicted from the suit property in 2014 by the 1st Defendant. He stated that at that time, there were 3 people who were occupying the suit property. He stated that Tom Odhiambo and Tom Arianda were the same person. He stated that they were evicted, but PW3 was left on the suit property. He stated that he occupied the suit property on the belief that it belonged to his father. He stated that they were not satisfied with the lower court's decision.
 16. On examination by the court, PW4 stated that he was from Kasagam, Kamrongo. He stated that his deceased father had one wife. He stated that there were 4 boys in the family, 2 of whom were deceased. He stated that his father's homestead was on Plot No. 230, while he (PW4) settled on Plot No. 221 (the suit property). He stated that he did not know the parcel number for the land on which the Plaintiff had set up his homestead. He stated that he was 52 years old and built his home in 2000.
 17. The witness statement by James Nyapola Odima filed on 24th July 2018 was adopted as his evidence by consent without him attending court for cross-examination.
 18. After the close of the Plaintiff's case, the 1st Defendant, George Benard Odhiambo (DW1) gave evidence. He adopted his witness statement dated 19th February 2019 as part of his evidence in chief and produced the documents attached to his list of documents filed on 21st February 2019 as D.EXH. 1 to 18 respectively. He stated that he filed the lower court suit (Winam SPM No. 120 of 2010) against three Defendants. He stated that the 1st Defendant in the lower court suit was not related to the Plaintiff while the 2nd and 3rd Defendants in the suit were the Plaintiff's brother and sister-in-law, respectively. He stated that the Plaintiff was a defence witness in the lower court suit and did not seek to join the suit. He stated that the Defendants in the lower court suit filed an appeal against the judgment of that court, but their application for a stay of execution was dismissed. He stated that the appeal was also dismissed with costs.



19. The 1st Defendant stated that as far as he was concerned, the issues raised in the present suit were raised in the lower court suit. He stated that when he purchased the suit property from the 2nd Defendant, the suit property was registered in the name of the 2nd Defendant. He stated that he did a search and also obtained a copy of the register, both of which showed that the 2nd Defendant was the owner of the property. He stated that the 2nd Defendant had a title deed, and after the suit property was transferred to him, he was also issued with a title deed. He prayed that the suit be dismissed.
20. On cross-examination by the Plaintiff's advocate, the 1st Defendant stated as follows: He purchased the suit property from the 2nd Defendant. He undertook due diligence. He did an official search and also a register search. The first time he wanted to purchase the suit property in 2008, there was nobody occupying the land. The sale transaction did not go through at the time. He came to purchase the land in 2010. He went to the land with a surveyor and found people occupying the same. He noticed that they were in occupation after he had entered into a sale agreement with the 2nd Defendant. He did not talk to the occupants of the land. This was not the first time he was buying land. The 2nd Defendant acquired the suit property during the land adjudication. The 2nd Defendant acquired the land from Maricus Ongele Chore, deceased. The persons who were in occupation of the suit property were relatives of the deceased. He did not need to engage the occupants of the land because the 2nd Defendant had all the title documents.
21. The 1st Defendant stated further as follows: He bought the suit property in 2010. Mathews Ongele and Syphrose Ogutu were evicted, but Tom Arianda was not evicted and was still in occupation of the suit property. He realised that there were people in occupation of the suit property in 2010 after he had entered into a sale agreement with the 2nd Defendant. He had not stated that the occupants of the land entered the land after he purchased the same. The estate of Maricus Ongele Chore was not a party to the lower court suit. He did not purchase the land from the deceased. He did not ask the 2nd Defendant to show him the agreement of sale he had with the deceased. The 2nd Defendant was not in occupation of the suit property. He was not conned because the 2nd Defendant had a title. The 2nd Defendant purchased the suit property from the deceased before the land adjudication.
22. On re-examination, the 1st Defendant stated that he visited the suit property in 2008. He stated that at the time, the land was not occupied. He stated that pursuant to the lower court decree, all the occupants of the suit property who were the relatives of the deceased were evicted by the auctioneers. He stated that the suit property had never been registered in the name of the deceased. He stated that the deceased never complained against the 2nd Defendant. He stated that the complaints started after the death of the deceased. He reiterated that when he bought the suit property, the same was registered in the name of the 2nd Defendant.
23. On examination by the court, the 1st Defendant stated that he wanted to purchase the suit property in 2008, but they did not agree on the price with the 2nd Defendant. He stated that they came to agree on the price in 2010, and that was when they entered into an agreement of sale. He stated that on 26th February 2010, when they entered into the agreement of sale, he did not visit the suit property. He stated that at the time, he did not know the status of the suit property on the ground. He stated that he knew the 2nd Defendant before he purchased the suit property. He stated that the 2nd Defendant was his long-time friend and was a businessman in Kisumu. He told the court that the people who were evicted were only occupying a portion of the suit property. He stated that the deceased Maricus Ongele Chore owned the suit property before land adjudication. He stated that the 2nd Defendant purchased the suit property before the land adjudication, and thereafter the same was adjudicated in his name. He stated that he had not taken possession of the suit property because of this suit.



24. After the close of evidence, the parties made closing submissions in writing.

The Plaintiff's submissions

25. The Plaintiff filed submissions dated 15th January 2025. The Plaintiff framed the following issues for determination;
- i. Whether the registration of the suit property in the name of the 2nd Defendant was fraudulent.
 - ii. Whether the transfer of the suit property by the 2nd Defendant to the 1st Defendant, and its subdivision into twelve portions, being Kisumu/ Chiga/ 3183 to 3193, was irregular.
 - iii. Whether the Plaintiff was entitled to the orders sought.
26. On the first issue, the Plaintiff submitted that the suit property was owned by the deceased, Maricus Ongele Chore. The Plaintiff submitted that the deceased never sold the suit property to the 2nd Defendant. The Plaintiff submitted that the deceased's family members were residing on the suit property until the 1st Defendant confronted them, claiming that he had purchased the property from the 2nd Defendant. The Plaintiff submitted that the 1st Defendant later subdivided the suit property and sought to evict the Plaintiff therefrom leading to the institution of this suit. The Plaintiff submitted that the 1st Defendant did not conduct proper due diligence before purchasing the property from the 2nd Defendant. The Plaintiff submitted that if the 1st Defendant had done so; he would have learned of the checkered history of the suit property, coupled with the fact that it was being occupied by the beneficiaries of the deceased's estate.
27. The Plaintiff submitted that the 2nd Defendant did not explain how he acquired the suit property, and the 1st Defendant was unable to defend the 2nd Defendant's title to the suit property. The Plaintiff submitted that the registration of the 2nd Defendant as the first owner of the suit property was not conclusive evidence that the 2nd Defendant was the proprietor of the property. In support of this submission, the Plaintiff cited Section 26(1) of the [Land Registration Act](#) 2012. The Plaintiff submitted that he had proved the particulars of illegality in the acquisition of the suit property, which he pleaded against the 2nd Defendant.
28. On the second issue, the Plaintiff submitted that since the registration of the suit property in the name of the 2nd Defendant was fraudulent, any subsequent transaction on the suit property by the 2nd Defendant was unlawful. The Plaintiff submitted that the transfer of the suit property by the 2nd Defendant to the 1st Defendant was irregular.
29. On the last issue, the Plaintiff submitted that he had proved his case on a balance of probabilities. The Plaintiff submitted that he had proved that the deceased was the bona fide owner of the suit property. The Plaintiff submitted that neither the 1st Defendant nor the 2nd Defendant had occupied the suit property. The Plaintiff submitted that he was entitled to the reliefs sought in his plaint.

The 1st Defendant's submissions

30. The 1st Defendant filed submissions dated 3rd March 2025. The 1st Defendant framed the following issues for determination;
- a. Whether the Plaintiff's suit offended the provisions of section 7 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya and as such was res judicata.
 - b. Whether the Plaintiff had proved fraud as alleged or at all.



- c. Whether the Plaintiff had made out a case for the grant of an injunctive relief.
 - d. Whether the suit was time-barred.
 - e. Who should pay the costs of the suit?
31. On the first issue, the 1st Defendant submitted that from the judgment made in the lower court suit (Winam Civil Suit No. 120 OF 2010), it was clear that the cause of action revolved around the ownership of the suit property. The 1st Defendant submitted that the court found in favour of the 1st Defendant on the issue and ordered the eviction of the Defendants in the suit from the suit property. The 1st Defendant submitted that the issues and the parties in this suit and the lower court suit mirror each other directly and as such this suit offends the provisions of Section 7 of the *Civil Procedure Act*. In support of this submission, the 1st Defendant relied on the Supreme Court case of Kenya Commercial Bank Limited v. Muiri Coffee Estate Limited & another Motion No 42 of 2014 [2016I eKLR (Muiri Coffee case) and John Florence Maritime Services Limited & another v. Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [202'1] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment).
 32. On the second issue, the 1st Defendant submitted that the Plaintiff alleged fraud on the part of the Defendants in the process of their acquisition of the suit property. The 1st Defendant submitted that the Plaintiff failed to adduce credible evidence in proof of the alleged fraud. The 1st Defendant submitted that the 2nd Defendant was the first registered owner of the suit property. The 1st Defendant submitted that there was no evidence that the deceased had at any time complained against the registration of the suit property in the name of the 2nd Defendant. The 1st Defendant submitted that the 2nd Defendant was registered as the owner of the suit property on 14th December 1983, during the lifetime of the deceased. The 1st Defendant submitted that the deceased, who died 14 years later, could have complained against the 2nd Defendant if indeed he was the owner of the suit property. The 1st Defendant submitted that there was no evidence that the suit property was at any time owned by the deceased. The 1st Defendant submitted that there was no evidence of adjudication or registration of the suit property in the name of the deceased. The 1st Defendant submitted that the allegations of fraud made against the Defendants was without foundation.
 33. The 1st Defendant submitted that the Plaintiff had claimed that the deceased had complained against the 2nd Defendant through a letter dated 10th July 1990 by the District Officer, Winam. The 1st Defendant submitted that there was no indication that the letter was written following a complaint by the deceased. The 1st Defendant relied on Kinyanjui Kamau v. George Kamau [2015] eKLR and submitted that he had produced elaborate evidence of how he bought the suit property, paid for it, obtained consent to transfer the same, effected the transfer after paying stamp duty and subsequently subdivided the same.
 34. The 1st Defendant submitted that all the people who were occupying the suit property were evicted following the judgment made in the lower court suit. The 1st Defendant submitted that in the circumstances, there was no reason to issue the orders of injunction sought by the Plaintiff, who was not in occupation of the suit property. The 1st Defendant submitted that Tom Arianda was not evicted and that the issue would be dealt with within the existing orders of eviction issued by the lower court.
 35. On the issue of the time bar, the 1st Defendant submitted that the Plaintiff produced a letter dated 10th July 1990 in a bid to demonstrate that his family had complained about the registration of the suit property in the name of the 2nd Defendant. The 1st Defendant submitted that this letter implied that as early as 1990, the Plaintiff had known that the suit property was registered in the name of the



2nd Defendant. The 1st Defendant submitted that this suit was filed 28 years after the Plaintiff knew of the registration of the suit property in the name of the 2nd Defendant without leave of court to file the suit out of time. The 1st Defendant cited Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya and submitted that the Plaintiff's right to claim the suit property was extinguished by effluxion of time.

Analysis and Determination

36. I have considered the pleadings, the evidence and the submissions by the parties. I am of the view that the issues arising for determination in this suit are the following;

- a. Whether the suit property was owned by Maricus Ongele Chore, deceased.
- b. Whether the registration of the 2nd Defendant and subsequently the 1st Defendant as the owners of the suit property was illegal and fraudulent.
- c. Whether the Plaintiff's suit is time-barred.
- d. Whether the Plaintiff is entitled to the prayers sought in the plaint.

37. The Plaintiff's case is that the suit property was at all material times owned by the deceased, Maricus Ongele Chore and that the deceased never sold the suit property to anyone. The Plaintiff averred that the 2nd Defendant illegally and fraudulently caused the suit property to be registered in his name before transferring the same to the 1st Defendant who in furtherance of the said fraud subdivided the same into twelve portions. The suit property was registered under the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed). Sections 27, 28 and 143 of the Registered *Land Act* provide as follows:

27. Subject to this Act –

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

143.



- (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge 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.

38. Section 26(1) of the [Land Registration Act](#) 2012, which repealed the Registered [Land Act](#), provides 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, and the title of that proprietor shall not be subject to challenge, except –

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

39. It is clear from the foregoing provisions of the law that a land title can be nullified on the grounds that the same has been acquired through fraud, mistake, misrepresentation, illegally, unprocedurally or through a corrupt scheme.

40. In *Kurshed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, the court stated as follows:

“(16) Turning to the second issue; according to section 107 of the [Evidence Act](#), the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.”

41. In *Halsbury’s Laws of England*, 4th Edition, Volume 17, at paras 13 and 14, the authors have stated as follows on the burden of proof:

“13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation



of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

42. In Black’s Law Dictionary 9th Edition at page 731 fraud is defined as:
a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”
43. In Railal Gordhanbhai Patel v. Lalji Makanji [1957] E.A 314, the court stated as follows at page 317:
Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
44. In Virani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd [2004] 2 E.A KLR 269, it was held that:
Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt”.
45. In Kampala Bottlers Ltd. v. Damanico (UG) Ltd. [1990-1994] E.A141(SCU), the Supreme Court of Uganda held that:
To impeach the title of a registered proprietor of land, fraud must be attributable to the transferee either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act. The burden of proof must be heavier than a balance of probabilities generally applied in civil matters.”
46. The burden was on the Plaintiff to prove that the suit property was registered in the name of the 2nd Defendant who transferred the same to the 1st Defendant, illegally and fraudulently. The Plaintiff failed to prove that the suit property was owned by the deceased, Maricus Ongele Chore. Although the Plaintiff claimed that the Adjudication Record(AR) indicated that the suit property was owned by the deceased, the said AR was not produced by the Plaintiff in evidence at the trial. I have noted from the record that the Plaintiff attached to his affidavit in support of his interlocutory application for injunction filed on 30th January 2014, copies of the Adjudication Demarcation Sketches which showed that the suit property was initially adjudicated and recorded in the name of the deceased as the owner and that the deceased’s name was subsequently cancelled from the Adjudication Record following an objection No. 303 that was lodged by the 2nd Defendant. It is not clear to the court why the Plaintiff did not produce these Adjudication Demarcation Sketches in evidence if he wanted to demonstrate that the suit property was initially adjudicated and recorded in the name of the deceased as the owner. What I can conclude from that failure is that the said documents would have been unfavourable to the Plaintiff’s case. The Plaintiff would have been confronted with the said objection No. 303 through which the 2nd Defendant was registered as the owner of the suit property. It is my finding that the Plaintiff failed to prove that the deceased was the owner of the suit property before the same was registered in the name of the 2nd Defendant.
47. The Plaintiff also failed to prove that the suit property was registered in the name of the 2nd Defendant fraudulently. Although the 2nd Defendant did not tender evidence at the trial, the Plaintiff still had the burden of proving his case against him. The burden of proof could only shift to the 2nd Defendant if the Plaintiff had placed before the court a prima facie case of fraud or illegality against the 2nd Defendant



which if not answered by the 2nd Defendant would have been taken by the court as true. The majority of the Supreme Court in Presidential Election Petition No. 1 of 2017, Raila Amolo Odinga & Another v. IEBC & 2 Others [2017] eKLR stated as follows on the evidential burden of proof in paragraphs 132 and 133 of the judgment:

(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant through a trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law..."

48. The Plaintiff failed to prove that the suit property was owned by the deceased and that its registration in the name of the 2nd Defendant was fraudulent and illegal.

49. In *Munyu Maina v. Hiram Gathiha Maina*, Civil Appeal No.239 of 2009, [2013] eKLR, the Court of Appeal stated as follows:

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."

50. The 1st Defendant demonstrated that he followed due process in acquiring the suit property from the 2nd Defendant. The 1st Defendant produced evidence showing that he conducted a search on the title of the suit property before purchasing the same. The certificate of official search showed that the suit property was registered in the name of the 2nd Defendant as the owner thereof. The 1st Defendant produced in evidence; a copy of the sale agreement that he entered into with the 2nd Defendant in respect of the suit property, a copy of the Land Control Board Consent for the transfer of the property to him, a copy of the instrument of transfer executed by both parties, a copy of stamp duty payment receipt and a copy of the title deed of the suit property issued to him upon registration of the transfer. There being no evidence that the 2nd Defendant held an invalid title to the suit property, it is my finding that the 2nd Defendant transferred a valid title in the suit property to the 1st Defendant and that the 1st Defendant acquired the suit property procedurally and lawfully.

51. Given the foregoing findings, it is not necessary for me to determine the issue whether the Plaintiff's suit is time barred. I wish to say however that if I was to determine the issue, my answer would be in the affirmative. The Plaintiff produced evidence at the trial showing that his deceased father knew as early as 10th July 1990 that the suit property was registered in the name of the 2nd Defendant. The deceased did not file a suit against the 2nd Defendant while he was alive. The Plaintiff, who is the administrator of the deceased's estate, did not bring the present suit until 22 years later, on 10th September 2012. When



this suit was filed, the 12-year limitation period for suits seeking recovery of land provided in Section 7 of the [Limitation of Actions Act](#) had lapsed. The suit was therefore time-barred.

Conclusion

52. In conclusion, I find the Plaintiff's case against the Defendants not proved to the required standard. The suit is dismissed with costs to the 1st Defendant.

DELIVERED AND SIGNED AT KISUMU ON THIS 24TH DAY OF JULY 2025

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Omondi h/b for Mr. Odeny for the Plaintiff

Ms. Wanyangu h/b for Mr. Onyango the 1st Defendant

N/A for the 2nd Defendant

Ms. J. Omondi-Court Assistant

