



**Opiyo (Suing as the Administrator of the Estate of Joseph Ogweno  
Omwaga, Deceased) v Songa (Environment and Land Appeal  
E029 of 2024) [2025] KEELC 5419 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5419 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E029 OF 2024**

**SO OKONG'O, J  
JULY 17, 2025**

**BETWEEN**

**GORBERCHEV OMWAGA BERG OPIYO ..... APPELLANT  
SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPH OGWENO  
OMWAGA, DECEASED**

**AND**

**LAZARO OJWANG SONGA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. E.A. Obina SPM delivered in the  
Chief Magistrate's Court at Kisumu, ELC Case No. 202 of 2018 on the 30th May 2024)*

**JUDGMENT**

1. This appeal is challenging the judgment delivered by Hon. E.A. Obina, SPM on 30<sup>th</sup> May 2024 in Kisumu CMC ELC Case No. 202 of 2018 (hereinafter referred to only as “the trial court”). The Respondent filed a suit against the Appellant at the trial court through a plaint dated 26<sup>th</sup> March 2018. The Respondent averred that at all material times, he was the owner of land parcel No. Kisumu/Konya/2137 (hereinafter referred to as “the suit property”). The Respondent averred that he had sold the suit property to one Charles Ochieng, who had taken possession thereof and had been using it since 2013.
2. The Respondent averred that while he was in the process of transferring the suit property to the said Charles Ochieng, he was shocked to learn that the property was registered in the name of Joseph Ogweno Omwaga, deceased (hereinafter referred to only as “the deceased”). The Respondent averred that the deceased caused the suit property to be registered in his name fraudulently.
3. The Respondent averred that as a result of the deceased’s action, he had been unable to effect the transfer of the suit property to Charles Ochieng. The Respondent prayed for judgment against the



Appellant for a declaration that the registration of the deceased as the owner of the suit property was fraudulent, hence null and void and an order for the cancellation of the title in the name of the deceased and issuance of a new title in the name of Charles Ochieng. The Respondent also prayed for the costs of the suit and interest.

4. The Appellant filed a statement of defence at the trial court on 4<sup>th</sup> December 2019. The Appellant denied the allegations made against the deceased in the plaint. The Appellant averred that he was a stranger to the suit property and the fact that it was registered in the name of the deceased, Joseph Ogweno Omwaga. The Appellant averred that the suit property did not exist as it had been subdivided and new numbers issued and registered. The Appellant averred that the suit property did not belong to the Respondent and as such there was no way the Respondent could have sold it to a third party. The Appellant denied that he was the administrator of the estate of the deceased. The Appellant prayed that the suit be dismissed with costs. The Respondent filed a reply to defence on 18<sup>th</sup> December 2019 in which he joined issue with the Appellant in his defence save for the admissions. The Respondent denied that the suit property had been subdivided and contended that if there was any subdivision, then the same was carried out fraudulently without his knowledge, as he had lost the original title deed for the property.
5. The trial court heard the matter and delivered a judgment in favour of the Respondent on 30<sup>th</sup> May 2024. The trial court made a finding that it was not clear how the suit property changed hands from the Respondent to the deceased. The trial court stated that there was no paper trail on how the Respondent ceased being the registered owner of the suit property. The court noted that there was no sale agreement, land control board consent and signed transfer forms in favour of the deceased. The trial court noted further that there was no evidence of payment of stamp duty or any fees in relation to the alleged transaction involving the suit property. The trial court found that the suit property was the Respondent's ancestral land and that the Respondent had always occupied the same. The trial court held that the Respondent had proved his case against the Appellant on a balance of probabilities and entered judgment in his favour. The trial court declared that the registration of the deceased as the owner of the suit property was fraudulent, null and void. The trial court cancelled the title deed that had been issued in the name of the deceased and the subdivision of the suit property, and ordered that the suit property be restored in the name of the Respondent. The Respondent was also awarded the costs of the suit.
6. The Appellant was aggrieved by the decision of the trial court and preferred the present appeal. In his Memorandum of Appeal dated 31<sup>st</sup> May 2024, the Appellant challenged the lower court's judgment on the following grounds;
  1. That the learned magistrate erred in law and fact in finding that the defence case should not be reopened despite the emergence of new material evidence crucial to the case.
  2. The learned magistrate erred in law and fact in finding that there was fraudulent and illegal activity at the land registry when the same was not proven to the required standard.
  3. That the learned magistrate erred in law and fact in failing to find that the Respondent did not have any locus to institute the suit or move the court when he was not the registered proprietor and did not claim any rights to the suit property on his own behalf despite glaring evidence on the face of the record.
  4. That the learned magistrate erred in law and in fact in failing to properly and constructively evaluate the entire evidence on record.



5. That the learned magistrate erred in law and in fact in failing to give both parties opportunity to produce any other evidence or call witnesses to enable the court to come to conclusive and just determination of the case.
6. That the learned magistrate erred in law and fact in relying on contradictory averments and testimony made by the Respondent and his witnesses, thereby arriving at the impugned judgment.
7. The Appellant prayed that the appeal be allowed and the judgment of the trial court be set aside. The Appellant also prayed for the costs of the appeal.
8. The appeal was argued by way of written submissions.

### **The Appellant's submissions**

9. The Appellant in his submissions dated 31<sup>st</sup> October 2024 framed the following issues for determination;
  1. Whether the trial magistrate ought to have reopened the Appellant's case
  2. Whether the Appellant had the locus to be sued.
  3. Whether the Respondent proved fraud as against the Appellant's deceased father.
10. The Appellant submitted that he sought to reopen his case after a judgment date had been issued. The Appellant submitted that he filed an application to reopen the case on grounds of discovery of new set of facts being that the survey report had grossly misrepresented facts to the court. The Appellant submitted that the trial court had the discretion to arrest the judgment and reopen the defence case or chose not to do so. The Appellant submitted that that discretion had to be exercised with caution to promote justice. In support of this submission, the Appellant cited *Wambua Maithya v. Pharmacy and Poisons Board; Pharmaceutical Society of Kenya & 2 Others (Interested Parties)* 2019 eKLR.
11. The Appellant submitted that he was sued in his capacity as the administrator of the estate of his deceased father, while he was not the administrator of that estate. The Appellant submitted that even after pointing out that fact, the Respondent did not attempt to correct the parties before the court. The Appellant submitted that he had no power to comply with the orders that were issued against him by the trial court. In support of this submission, the Appellant cited Order 3 Rule 7 of the Civil Procedure Rules and *Mumo Matemu v. Trusted Society for Human Rights Alliance & 5 Others* [2014] eKLR.
12. On whether the Respondent proved fraud against the deceased, the Appellant submitted that allegations of fraud must be proved beyond a balance of probabilities, and the onus of proving the same rests solely on the party asserting the same. In support of this submission, the Appellant cited *Kuria Kiarie & 2 Others v. Sammy Magera* [2018] eKLR. The Appellant submitted that the forgeries pleaded by the Respondent were not proved. The Appellant submitted that the trial magistrate misinformed himself by considering evidence not adduced before the court and shifting the burden of proof to the Appellant when the onus of proving fraud was on the Respondent.

### **The Respondent's submissions**

13. The Respondent in his submissions dated 29<sup>th</sup> November 2024 framed the following issues, which he submitted on;



### **Whether the Trial Magistrate ought to have reopened the Appellant's case**

15. The Respondent submitted that on 17<sup>th</sup> May 2021, the Appellant closed his case before the trial court and after several mentions, the parties agreed that the Land Registrar attend court and present his report, which was done on the 29<sup>th</sup> August 2023, and thereafter the case was again closed and the matter reserved for judgment on 22<sup>nd</sup> February 2024. The Respondent submitted that on 6<sup>th</sup> February 2024, the Appellant filed an application seeking to have his case reopened as there was a new and important discovery that the trial court ought to note. The application was dismissed in a ruling delivered on the 30<sup>th</sup> April 2024, and that put the issue to rest.
16. The Respondent submitted that the Appellant filed a Miscellaneous Application namely, KISUMU ELC Misc. App. No. E 020 of 2024 - Gorberchev Omwaga Berg Opiyo (Suing as Administrator of the Estate of Joseph Ogwen Omwaga) v. Lazaro Ojwang Songa on the 2<sup>nd</sup> May 2024 seeking leave to appeal against the said ruling by the trial court delivered on the 30<sup>th</sup> April 2024 but the said application was later withdrawn by the Appellant. The Respondent submitted that if at all, the Appellant wanted to challenge the ruling delivered on the 30<sup>th</sup> April 2024, he ought to have filed an appeal against the same before 30<sup>th</sup> May 2024. The Respondent submitted that the appeal before this court against the said ruling is time-barred.
17. The Respondent submitted that the trial magistrate was right in declining to allow the reopening of the case. The Respondent submitted that the Land Registrar's report dated 21<sup>st</sup> December 2022 had been in the hands of the parties for over 1 year at the time the Appellant sought to reopen the case. The Respondent submitted that there was nothing new that the Appellant was bringing to the attention of the court. The Respondent submitted that the Land Registrar attended court on 29<sup>th</sup> August 2023 and presented his report in the presence of the Appellant's advocate. The Respondent submitted that any issue the Appellant had with the report ought to have been brought to the attention of the trial court at the time the report was presented to the court. The Respondent submitted that if at all the Land Registrar's report was inaccurate, the Appellant had the time, from the date the report was handed over to the parties to the date the Land Registrar presented the report to the court, to highlight the anomalies the Appellant alluded to. In support of this submission, reliance was placed on Samuel Kiti Lewa v. Housing Finance Co. of Kenya Ltd & Another [2015] eKLR.

### **Whether the Appellant had the locus to be sued**

18. The Respondent submitted that he presented to the trial court evidence of the existence of Maseno Succession Cause No. No. 80 of 2012 – In the matter of the Estate of Joseph Ogwen Omwaga. The Respondent submitted that the petition for Grant of Letters of Administration in the said succession cause was brought by the Appellant, Gorberchev Omwaga Berg Opiyo. The Respondent submitted that while filing the suit, he knew that the Appellant was the administrator of the estate of his deceased father, Joseph Ogwen Omwaga. The Respondent submitted that the Appellant was rightly sued. The Respondent submitted that the Appellant admitted that he was aware of the succession cause and that he filed it. The Respondent submitted that the Appellant could not run away from being the rightful party to be sued by the Respondent.

### **Whether the Respondent proved fraud against the Appellant's father**

19. The Respondent cited Kuria Kiarie & 2 Others v. Sammy Magera [2018] eKLR and submitted that he was the first registered owner of the suit property. The Respondent submitted that the property was registered in his name until he realised that the same had been transferred to the deceased, Joseph Ogwen Omwaga and subdivided. The Respondent submitted that there were no documents



supporting the said transfer at the Department of Lands and that the Respondent, who was the first registered owner of the suit property denied selling or transferring the property to the deceased. The Respondent submitted that this was a prima facie evidence that the transfer in favour of the deceased was fraudulent and illegal. In support of this submission, the Respondent cited *Alice Chemutai Too v. Nickson Kipkurui Korir & 2 Others* [2015] eKLR.

### **Analysis and Determination**

20. I have considered the pleadings and the proceedings of the trial court. I have also considered the judgment of the court, the grounds of appeal by the Appellant and the submissions by the parties. This being a first appeal, this court has to reconsider and re-evaluate the evidence on record and draw its conclusions on the issues that were raised for determination before the trial court.

21. In *Kenya Ports Authority v. Kuston (Kenya) Limited* [2009] 2EA 212, the Court of Appeal stated that:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that 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.”

See also, *Verani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269, *Selle v. Associated Motor Boat Co. Ltd.* [1968] E.A 123 and *Abok James Odera t/a Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR on the duty of the first appellate court.

22. This court will not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v. Sunday Post Ltd.* [1958] E.A 424 and *Makube v. Nyamuro*[1983] KLR 403.

23. The Appellant’s grounds of appeal raise three issues for determination by this court, namely;

1. Whether the trial court erred in not reopening the Appellant’s case;
2. Whether the trial court erred in its finding that the Respondent had proved his case against the Appellant to the required standard.
3. Whether the appeal should be allowed.

### **Whether the trial court erred in not reopening the Appellant’s case.**

24. The Appellant filed an application dated 6<sup>th</sup> February 2024 seeking leave to reopen his case on grounds of discovery of new evidence. The Appellant had contended that the survey report that was produced by the Land Registrar had grossly misrepresented facts to the court in that, whereas the Appellant’s visit to the suit property showed that there were no structures thereon, the report had indicated that the property was occupied and had structures. From the record, the ruling on the application was to be delivered on 30<sup>th</sup> April 2024. Although in his grounds of appeal, the Appellant has contended that the trial court made a finding that the Appellant’s case could not be reopened, and the Respondent has also referred in his submissions to a ruling that was made by the trial court on the issue on 30<sup>th</sup> April 2024, the Appellant did not include a certified copy of the ruling and the order extracted therefrom in the record of appeal. In the absence of a copy of the ruling in the record of appeal, I am unable to know the grounds upon which the trial court dismissed the said application. In the circumstances, I



am not in a position to determine whether the trial court erred in its ruling on the application. This ground of appeal fails for the Appellant's failure to include in the record of appeal a certified copy of the ruling and the order that emanated therefrom.

**Whether the trial court erred in its finding that the Respondent had proved his case against the Appellant to the required standard.**

25. On the issue of proof of the Respondent's case, the Appellant raised two issues. First, the Appellant contended that he was not the administrator of the estate of Joseph Ogwen Omwaga, deceased and as such had no legal capacity to be sued. Secondly, the Appellant contended that the allegations of fraud that were levelled against the estate of the deceased were not proved. The Appellant was sued as the administrator of the estate of Joseph Ogwen Omwaga, deceased. From the record, the Appellant took the earliest opportunity to notify the Respondent and the court that he was not the administrator of the estate of the deceased. See the affidavit in support of the Appellant's application dated 2<sup>nd</sup> December 2019 for leave to file a defence out of time at page 134 of the record of appeal. After obtaining leave to file a defence out of time, the Appellant filed a defence on 4<sup>th</sup> December 2019 in which he stated that he was not the administrator of the estate of the deceased. The Appellant did not stop there. In his list of documents, the Appellant attached a copy of Certificate of Confirmation of Grant of Letters of Administration in respect of the estate of the deceased issued by the High Court in Nairobi on 30<sup>th</sup> April 2003 to Rebecca Musavi Omwaga and Arciah Wangara in Succession Cause No. 771 of 1998. The Appellant maintained throughout the trial up to submissions that he was not the administrator of the estate of the deceased and that the administrators of the estate of the deceased were Rebecca Musavi Omwaga and Arciah Wangara. The Respondent did not place any evidence before the court showing that the Appellant had been appointed as the administrator of the estate of the deceased. What the Appellant produced before the court was a Gazette Notice No. 15858 dated 29<sup>th</sup> August 2012, published in the Kenya Gazette of 2<sup>nd</sup> November 2012 by the Deputy Registrar, Maseno Principal Magistrate's Court of a petition for Grant of Letters of Administration in respect of the estate of the deceased that the Appellant had filed in that court. It is not clear from the record as to what the Appellant was up to with this petition because a Grant of Letters of Administration in respect of the estate of the deceased had already been issued by the High Court in Nairobi and confirmed on 30<sup>th</sup> April 2003 several years before the Appellant purported to make this second application for a Grant in respect of the same estate. It did not come out at the trial whether the Maseno court issued another Grant of Letters of Administration in respect of the estate of the deceased to the Appellant. There is no such evidence on record. A notice of an application for a Grant of Letters of Administration does not amount to a Grant. The Appellant, having placed evidence before the court showing that he was not the administrator of the estate of the deceased and given the particulars of the administrators, the Respondent had the burden of disproving that evidence by showing that the Appellant was issued with a Grant of Letters of Administration by the Magistrate's Court at Maseno. No such evidence was placed before the court. I agree with the Appellant that the trial court erred in not finding that he had no legal capacity to be sued on behalf of the estate of the deceased. The Respondent, having sued the wrong person as the administrator of the estate of the deceased, cannot be said to have proved his case against the estate of the deceased. Due to the foregoing, it is my finding that the Respondent did not prove his case against the estate of the deceased. Given that finding, I do not need to consider whether the Respondent proved fraud that was the basis of his case before the trial court. Fraud could only be proved against the administrators of the estate of the deceased who were not before the court. There is a possibility of another suit being filed against the administrators of the estate of the deceased. From the Certificate of Confirmation of the Grant of Letters of Administration issued to Rebecca Musavi Omwaga and Arciah Wangara, it appears that the suit property had already been subdivided at the time of the trial and the subdivisions distributed to the beneficiaries of the estate of the deceased



in the Nairobi Succession Cause, including the Appellant, who got most of the parcels if not all. The Respondent may decide to sue the Appellant in his personal capacity and the administrators of the estate of the deceased. I would therefore refrain from giving an opinion on whether the Appellant proved fraud against the estate of the deceased so as not to embarrass or tie the hands of the lower court or any other court that may hear such a suit.

### **Whether the appeal should be allowed**

26. The Appellant's appeal succeeds on the sole ground that he had no legal capacity to be sued on behalf of the estate of the deceased, Joseph Ogweno Omwaga. All is not lost for the Respondent. The Respondent is at liberty to bring a suit against the administrators of the estate of the deceased and the beneficiaries of the estate if so advised. I will allow the appeal. I will however, not award the Appellant the costs of the Appeal and the lower court suit as he did not explain clearly at the trial and before this court under what circumstances he made another application for Grant of Letters of Administration in respect of the estate of the deceased in the Magistrates Court at Maseno in 2012 while a Grant of Letters of Administration which he claims to be valid had already been issued by the High Court in Nairobi in 2003.

### **Conclusion**

27. In conclusion, I allow the appeal, set aside the judgment of the trial court delivered on 30<sup>th</sup> May 2024 and substitute it with an order striking out the Respondent's suit before the trial court. Each party shall bear its costs of the Appeal and the suit before the trial court.

**DELIVERED AND SIGNED AT KISUMU ON THIS 17<sup>TH</sup> DAY OF JULY 2025**

**S. OKONG'O**

**JUDGE**

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

Ms. Ochieng h/b for Mr. Obach for the Appellant

Mr. Kouko for the Respondent

Ms. J. Omondi-Court Assistant

