



Maana & 3 others v Mbomere & 6 others (Environment and Land Appeal E008 & E009 of 2022 (Consolidated)) [2024] KEELC 3702 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3702 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL E008 & E009 OF 2022 (CONSOLIDATED)**

**BN OLAO, J
MAY 9, 2024**

BETWEEN

CHARLES PATRICK MAANA APPELLANT

AND

OUMA ADOKA MBOMERE 1ST RESPONDENT

**DAUDI DADO NYABOLA (SUBSTITUTED BY 4TH, 5TH AND 6TH
RESPONDENTS) 2ND RESPONDENT**

MATHEWS TONADO OKECH 3RD RESPONDENT

ANTHONY OKOBWA DADO 4TH RESPONDENT

HERBERT TINTIN DADOH 5TH RESPONDENT

JUSTUS NAMENYA DADO 6TH RESPONDENT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND APPEAL E009 OF 2022

BETWEEN

ANTHONY OKOBWA DADO 1ST APPELLANT

DADOH TINTIN HERBERT 2ND APPELLANT

JUSTUS NAMENYA DADO 3RD APPELLANT

**APPELLANTS AS PERSONAL REPRESENTATIVES OF THE ESTATE OF
DAUDI DADO NYABOLA**

AND

MATHEWS TONADO OKECH 1ST RESPONDENT



(Arising from the Judgment of HON. P. A. OLENGO SPM delivered on 1st April 2022 in BUSIA CM ELC CASE NO. 34 OF 2020)

JUDGMENT

1. The above appeals were, with the consent of the parties, consolidated for purposes of hearing. They involve the same parties and the same parcel of land being land parcel NO Bukhayo/Bugengi/1334 (the suit land). It is, however, not entirely clear why two appeals were filed arising out of the same judgment. On 28th September 2023 MR FWAYA counsel for the Appellants in Busia ELCA NO E009 addressed the Court stating that the said appeal be considered as the cross-appeal. I am not very sure about that taking into account the fact that the Appellants in both appeals are different yet a cross-appeal, as defined in Black's Law Dictionary, 10TH EDITION is:

“An appeal by the appellee, usu heard at the same time as the Appellant’s appeal.”

An appellee is defined in the same Dictionary as;

“A party against whom an appeal is taken and whose role is to respond to that appeal, usu. Seeking affirmance of the lower Courts decision.”

That notwithstanding, I shall consider the two appeals separately.

2. The appeals arise out of the judgement delivered by Hon. P.A. Olengo SPM on 1st April 2022 in which he dismissed the claim by Charles Patrick Maana seeking orders to have acquired the suit land by way of adverse possession. That suit was filed against Ouma Adoka Mbomere, Daudi Dado Nyabola (later substituted by Anthony Okobwa Dado, Herbert Tintin Dado and Justus Namenya Dado, Mathew Tonado Oketch and Equity Bank. That suit had been commenced by Charles Patrick Maana (the Appellant in BUSIA ELCA NO E008 of 2022) vide an amended Originating Summons dated 28th August 2020. The gist of his claim was that he had purchased 3 acres out of the suit land from Ouma ADOKA Mbomere vide two agreements dated 27th August 2007 and 2008 and had gone into occupation thereof and continued to enjoy open, quiet and un-interrupted possession for a period exceeding 12 years yet Mathew Tonado Oketch the 3rd Defendant in the Originating Summons and who is the 3rd Respondent herein had invaded it and destroyed his trees valued at Kshs.17,345,323.29 and also charged the title thereto to Equity Bank (K) LTD which was the 4th Defendant in the suit before the trial Court.
3. The Appellant also sought the cancellation of the title to the suit land held by the 3rd Respondent on the ground that he (the Appellant) had acquired it by way of adverse possession.
4. On his part, the 2nd Respondent who was later substituted by the Appellants in Busia ELCA NO E009 of 2022 sought the cancellation of the 3rd Respondent’s title to the suit land on the basis that it had been obtained fraudulently.
5. The 1st Respondent denied that the Appellant had ever occupied the suit land or planted trees thereon.
6. The 2nd Respondent denied having sold the suit land to the 3rd Respondent or any other person and sought the cancellation of the 3rd Respondent’s title. He disputed the contents of his replying affidavit dated 31st March 2020 and drawn by Ouma Okutta Advocate in which he had deposed, inter alia, that



he had sold the suit land to the 3rd Respondent and further, in which he had disputed the Appellants claim to the suit land by way of adverse possession. In another affidavit dated 10th August 2020, he had sought that the replying affidavit dated 31st March 2020 be expunged from the record.

7. The 3rd Respondent filed an affidavit dated 19th February 2021 in which he deposed, inter alia, that he had purchased the suit land from the 2nd Respondent vide a sale agreement dated 14th February 2020 after which he obtained the title deed thereto dated 24th February 2020. Later, the 2nd Respondent denied that transaction and reported the matter to the Police who filed a report dated 16th June 2020 exonerating him of any fraudulent activity with regard to the transaction. He also denied the 2nd Respondent's counter-claim against him.
8. The 4th Respondent did not participate in the proceedings.
9. Having heard the parties and their witnesses, the trial magistrate dismissed the claim by Charles Patrick Maana against Ouma Adoka Mbomere, Daudi Dado Nyabola, Mathew Tornado Okech and Equity Bank. He also dismissed the counter-claim by Daudi Dado Nyabola against Mathew Tornado Okech and Equity Bank. He found that Mathew Tornado Okech had acquired the title to the suit land after complying with all the relevant procedures and that the claim to the suit land by way of adverse possession by Appellants and the Appellant's counter-claim alleging fraud on the part of the 3rd Respondent were not merited.
10. That judgement provoked the two appeals being the subject of this judgement. I shall consider the two appeals sequentially.
11. As a first appellate Court, my role is to re-examine the evidence on record and reach my own conclusion – *Selle & Another –v- Associated Motor Boat Company Ltd* 1968 E.A. 123. This Court is mandated to re-evaluate the evidence which was before the trial Court and arrive at it's own independent judgment on whether or not to allow the appeal. In doing so, I must subject the whole evidence to a fresh scrutiny while bearing in mind that I neither saw nor heard the witnesses testify. However, as an appellate Court, I must open the whole case to a re-hearing on issues of fact and law – *Peters –v- Sunday Post Ltd* 1958 E.A. 424.
12. Before I do so, I wish to point out that I have perused the record of appeal filed in ELCA NO E008 of 2022 and compared it with the record of proceedings in BUSIA CMC ELC CASE NO 34 of 2020 and found several inconsistencies. For example page 42 of the proceedings before the trial Court is missing. Indeed in his submissions Mr. Okutta has alluded to some of these gaps and submitted thus;

“Your Honour, that the handling of this appeal by the 1st Appellant has been clumsy cannot be denied.”

A record of appeal must be a true reflection of what transpired in the trial Court. An incomplete record may render the appeal incurably defective. Mr. Okutta has alluded to that in his submissions where one of the issues raised is whether infact there is a competent appeal before this Court. An incompetent appeal is for striking out and the Court need not go further to consider it's merit or otherwise. The Supreme Court in the case of *Bwana Mohamed Bwana v Silvano Buku Bonaya & 2 Others* 2015 eKLR alluded to that when it said:

“A Court cannot exercise it's adjudicatory powers conferred by law or *the Constitution* where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

Jurisprudence is legion on that issue. Order 42 of the Civil Procedure Rules must be complied with.



13. In this case, however, the two appeals have been consolidated. I have perused the record of appeal In ELCA NO E009 of 2022 and the record appears to be proper and since the appeals arise from one judgment, I will save both of them.

ELCA NO E008 of 2022:

14. The following grounds have been set out vide the amended memorandum of appeal dated 15th May 2023 in seeking to have this Court quash the above judgment and make any award in favour of the Appellant:
 1. The learned trial magistrate erred in basing on extraneous matter to find that the possession by the Appellant of the land parcel NO Bukhayo/Bugengi/1334 was interrupted when the Defendant never testified anything to that effect as the basis of his defence in BUSIA CM ELC CASE NO 75 of 2019.
 2. The learned trial magistrate erred in law in finding that adverse possession does not lie in respect of a sale of land.
 3. The learned trial magistrate erred in law in delving with the issue of compelling the land disputes tribunal when indeed there was no issue before the Court.
 4. The learned trial magistrate erred in law in not finding that the Plaintiff was executing a decree of the tribunal yet that was not relevant in this case.
 5. That the learned trial magistrate erred in not finding that the 3rd Respondent did not destroy the trees yet there was evidence on a balance of probabilities to that effect.
 6. That the learned trial magistrate erred in law in not awarding the Appellant the amount prayed for in the amended Originating Summons being the value of the damaged trees.
15. The appeal has been canvassed by way of written submissions. The same have been filed by MR Namatsi instructed by the firm of Namatsi & Company Advocates for the Appellant, Mr Okutta instructed by the firm of Ouma – Okutta & Associates Advocates for the 1st Respondent, MR Ouma instructed by the firm of B. M. Ouma & Company Advocates for the 2nd Respondent and by MR. James Were instructed by the firm of Gabriel Fwaya Advocates for the 3rd, 4th and 5th Respondents.
16. I must at this stage point out that in their submissions in respect to the consolidated appeals, all counsel have erroneously referred to Equity Bank (K) LTD as a Respondent in both appeals. The said Equity Bank (K) LTD is only a Respondent in ELCA NO E009 of 2022 in which it is a 2nd Respondent. It is not a 3rd, 4th, or 6th Respondent as cited by counsel for the parties. And as per the memorandum of appeal, the parties in ELCA NO E008 of 2022 are as cited at the commencement of this judgment. However, the said Equity Bank (K) LTD was named as the 4th Respondent in the amended Originating Summons filed in BUSIA CMC ELC CASE NO 34 of 2020 (OS).
17. Counsel for the Appellant has also submitted that there is no valid judgment from the lower Court before me since it does not bear the signature of the magistrate. This is how MR NAMATSI has submitted in paragraph 4 of his submissions:

“My lord we invite you to have a look at the judgment which is the basis of this appeal, it is dated 1st April 2022 neither does the handwritten nor typed copy bare the signature of the learned magistrate. The validity of the said judgment is therefore in question.”



Citing the case of South Nyanza Sugar Co. Ltd –v- Elijah Ntabo Omoro Civil Appeal NO 60 of 2005 [2011 eKLR], counsel proceeds to submit that:

“It is trite that for a judgment of the Court to be valid, it must be dated, signed and delivered in open Court.”

Order 21 Rule 3(1) of the Civil Procedure Rules provides that:

“A judgment pronounced by the judge who wrote it shall be dated and signed by him in open Court at the time of pronouncing it.”

The record of appeal filed by the Appellant does not contain the handwritten judgement pronounced by the trial magistrate. It only contains the typed copy of the said judgment which though not signed, it clearly states that it was delivered in open Court on 1st April 2022 and both MR Okutta and MR Sibala holding brief for MR Fwaya were present. I have however also looked at the handwritten judgment which was not filed by the Appellant as part of his record. The said judgment is signed by the trial magistrate and was also delivered in open Court on 1st April 2022 in the presence of the counsel named above. It is therefore not factual for MR Namatsi to submit, as he has done, that “neither the handwritten nor typed copy have the signature of the learned magistrate”. The truth of the matter is that although the typed copy is not signed, the handwritten judgment was duly signed, dated and delivered in open Court. There is therefore a valid judgment before me.

18. I have considered the record of the trial Court, the submissions by counsel and the guiding precedents. This is first appeal. A reading of several precedents including *Selle & Another v Associated Motor Boat Company* 1968 E.a. 123, *Peters v Sunday Post Ltd* 1958 E.A. 424, amongst others, show that a first appellate Court is mandated to re-evaluate the evidence which was presented before the trial Court as well as the judgement. It must then make its own judgment on that evidence after subjecting the evidence to a fresh and exhaustive scrutiny although always bearing in mind that it neither saw nor heard the witnesses testify.
19. In considering this appeal, I must first deal with the issue whether the trial Court had the jurisdiction to determine a claim based on adverse possession. The record shows that the issue was first raised by the 3rd Respondent vide his Notice of Motion dated 6th April 2020. On 7th April 2020, the trial magistrate stated that the issue needed to be addressed. He said:

“The issue of jurisdiction has been raised and I think the same should be addressed first before getting into merits of the application.”

That was the furthest that the issue of jurisdiction was raised. It was not canvassed during the trial and has not been raised in the amended memorandum of appeal. It has only been raised in the submissions by the Respondents and the trial Court did not deal with it in the impugned judgment. In the case of *R.V. Tribunal Of Inquiry To Investigate The Conduct Of Tom Mbaluto & Others* 2018 Eklr (as Cited In *Fera Engineering Company Ltd v Morris Mureithi* 2020 eKLR) it was held that:

“As has been stated time and again, there is a philosophy and logical reason behind our appellate system which, except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate Court to consideration of the issues that were canvassed before and decided by the trial Court. If that were not the case, the appellate Court would become a trial Court in disguise and make decisions without the benefit of the input of the Court of first instance.”



In any event, this Court is aware, without deciding on the issue as it is now not before me, that Ohungo J in the case of Peter Ndegwa Munyua & Another 2020 eKLR, took the view that the magistrates Court has jurisdiction to determine a dispute based on a claim of adverse possession. The value of the suit land as per the two sale agreements dated 26th November 2007 and 2008 and which the Appellant filed in support of his claim was Kshs.247,000. That sum was well within the pecuniary jurisdiction of the trial magistrate. Clearly, the trial magistrate cannot be accused of usurping jurisdiction which he did not have. I can therefore state that even if the issue of jurisdiction had been raised in this appeal, I would hold that the trial magistrate had the requisite jurisdiction to determine the dispute as the case of Peter Ndegwa Munyua v Benjamin Kiiru Mwangi (supra) was binding on him.

20. Having said so, the grounds of appeal raised in the amended memorandum of appeal dated 15th May 2023 can all be collapsed into two issues. These are:

1. Whether the Appellant proved his claim to the suit land by way of adverse possession.
2. Whether the Respondents should compensate the Appellant in the sum of Kshs.17,345,323.39 being the value of his damaged trees.

I shall consider those claims in the following order:

Appellants Claim In Adverse Possession:

21. As per his amended Originating Summons dated 26th August 2020, the Appellant's claim in adverse possession was filed against Ouma Adoka Mbomere, Daudi Dado Nyabola, MathewS Tonado Okech and Equity Bank (K) LTD (the 1st, 2nd, 3rd and 4th Respondents respectively). That is clear from paragraph 1 of the said amended Originating Summons which reads:

“Let Ouma Adoka Mbomere Daudi Dado Nyabola, MathewS Tonado Okech and Equity Bank (K) LTD of Busia County within the Republic of Kenya within 15 days after service of this summons on them enter appearance to this summons which is issued on the application by Charles Patrick Maana Who claims to have acquired title to 3 acres of land parcel NO Bukhayo/Bugengi/1334 by way of adverse possession for orders and determination of the following issues.”

However, it is clear from the subsequent paragraphs of the amended originating summons that the claim in adverse possession is targeted against the 3rd Respondent only and does not concern the other Respondents. For instance, in paragraphs 4 and 5 of the amended Originating Summons, it is pleaded that the issues for determination include:

- 4: “Whether the title of the 3rd Respondent land measuring 3 acres in respect of land parcel known as Bukhayo/Bugengi/1334 got extinguished by operation of the law on expiry of 12 years after the Applicant took possession thereof”.
- 5: “Whether the registration of the 3rd Respondent as the proprietor of the whole land parcel NO Bukhayo/Bugengi/1334 should be cancelled and the said land measuring 3 acres be transferred and registered in the names of the Applicant.”

A claim to land by way of adverse possession can only be made against the registered proprietor of the land. That is clear from a reading of Section 38(1) of the [Limitation of Actions Act](#) which provides as follows:

38(1) “Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under



any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

The Originating Summons was first filed in the subordinate Court on 20th March 2020 (not on 20th March 2018 as erroneously stamped thereon in the Registry). By 20th March 2020, the 1st and 2nd Respondents were no longer the registered proprietors of the suit land. It had been registered in the name of the 3rd Respondent on 24th February 2020 and he held the title deed thereof in his name issued on that date. The 4th Respondent was never at anytime the registered proprietor of the suit land. The suit as against the 2nd Respondent was withdrawn on 19th August 2021. No claim in adverse possession could therefore be sustained as against the 1st, 2nd and 4th, 5th and 6th Respondents. The suit against them was therefore properly dismissed.

22. As against the 3rd Respondent, the trial magistrate took the view that a claim in adverse possession cannot be sustained on the basis of a sale agreement. This is what the trial magistrate has stated at page 185 of his judgment as per the record of appeal:

“Further, the Applicant/Plaintiff herein also claimed that he entered the land after a sale agreement between him and the 1st Defendant/Respondent. It is trite law that a claim of adverse possession cannot arise from land sale agreement. Sale agreement means the possession is with the permission of the owner.”

That was clearly an error in law and MR Namatsi counsel for the Appellant rightly pointed that out in his submissions at paragraph 29 where he has stated that:

- 29: “My Lord, the learned trial magistrate erred finding that the Appellant cannot bring a claim of adverse possession since he entered the suit land after a sale agreement. In *Wambugu –V- Njuguna* 1983 KLR 173, the Court inter alia held under holding NO 8 thus-”

Mr. Were also submitted, but relying on the ground of jurisdiction, which this Court has already determined, that indeed the Appellant’s appeal on the claim of the suit land by way of adverse possession is without merit and is for dismissal.

23. The correct position in law is that a purchaser in occupation after paying the full purchase price is a person in whose favour time can start running for purposes of adverse possession. In *Peter Mbiru Michuki –V- Samuel Mugo Michuki* 2014, the Court of Appeal held that:

“A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.”

Similarly, in the case of *Public Trustee –v- Wanduru Ndegwa C.A. Civil Appeal NO 73 of 1982* [1984 KLR], Madan JA (as he then was) also reiterated that a purchaser in possession after paying the full purchase price of the land is a party in whose favour time for purposes of adverse possession can run. That was the dicta followed in the case of *Peter Mbiru Michuki –v- Samuel Mugo Michuki* (supra). Similarly, in *Hosea v Njiru & Others* 1974 E.A. 526, it was held that once payment of the last instalment of the purchase price is paid, the purchaser’s possession of the land becomes adverse to the vendor and henceforth his occupation thereof for a period of twelve years entitles the purchaser to be registered as the proprietor thereof by way of adverse possession.

24. The next issue therefore is whether the Appellant, as purchaser of the suit land, met the threshold of an adverse possessor. It is clear from the Appellant’s own supporting affidavit as filed in the Originating Summons and the documents filed, that he purchased the suit land by way of instalments. The first payment of Kshs.216,000 was paid on 27th August 2007 while the second payment of Kshs.136,000



was paid on the 27th day of an un-specified month in 2008. It is clear from the two agreements that the Appellant only took possession of the 3 acres out of the suit land which he claims, after paying the final instalment of Kshs.136,000 in 2008. Although in his evidence in chief the Appellant stated that he entered the suit land in 2007, the last paragraph of the sale agreement dated 2008 reads in paragraph 4 thus:

4: “That the purchaser is at liberty to take vacant possession of the said partion (sic) of land.”

There is no such provision in the first agreement dated 26th November 2007 and since the Appellant was claiming the whole 3 acres for which he paid the purchase price in instalments, he only finished paying the last instalment and took possession thereof in 2008. And just like the agreement for 2008 is silent as to the month in which it was executed, the Appellant did not also in his testimony in Court confirm when exactly he paid the last installment of the purchase price. When he was cross-examined by MR Fwaya on that issue on 7th October 2020, he only said:

“I first made payment for the land in 2007 and the last payment was in 2008 and the land is Bukhayo/Bugengi/1334.”

Since, as is clear from the above precedents, the 12 years started running, for purposes of adverse possession, when the Appellant paid the last instalment, the onus was on him to prove that by the time he filed this suit on 20th March 2020, the 12 years had expired. However, the Appellant has not disclosed exactly which month in 2008 he paid the last instalment of the purchase price. This Court cannot therefore compute when the 12 years period commenced and ended. It was the duty of the Appellant to prove, during the trial, that indeed the 3rd Respondent’s title to the suit land had been extinguished by the time the Originating Summons was filed. It was him who wanted the trial magistrate to believe that allegation. Sections 107, 108 and 109 of the Evidence Act are clear on that. They read as follows:

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- (1) “Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
- (2) “When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

108. “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

109. “The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

In the absence of that crucial evidence, it would have been difficult for the trial magistrate to be able to determine when exactly the Appellant acquired the suit land by way of adverse possession.

25. Secondly, it was evident during the trial in the subordinate Court that the Appellant’s occupation of the suit land was not peaceful and infact it had been interrupted in 2019 when the 2nd Respondent filed BUSIA CMCC NO 75 of 2019 seeking to injunct the Appellant therefrom. The plaint in that case was among the documents filed in BUSIA ELC CASE NO 34 of 2020 by the Appellant who was the Plaintiff. The trial magistrate took the view, and rightly so, that the said suit interrupted the



Appellant's possession of the suit land. After citing the case of *Githu v Ndeete* 1984 KLR 776, the trial magistrate stated the following at page 184 of his judgment as per the record of appeal:

“I have noted that the Applicant/Plaintiff herein in his supplementary affidavit sworn 15th April 2020 and filed in this Court on 16th April 2020 attached summons to enter appearance and a plaint in respect of BUSIA CMCC NO 75/2019 which case was filed by 2nd Defendant herein against the Plaintiff herein Charles Patrick Maana in respect of the land parcel NO Bukhayo/Bugengi/1334. The defendant then the Plaintiff in the above BUSIA CM ELC NO 75/2019 which was filed on 13th June 2019 prayed for a permanent injunction against the Plaintiff herein Charles Patrick Maana. It therefore means that there was an interruption by the Defendant herein asserting his right by filing a case on 13th June 2019 where he prayed a permanent injunction against the Applicant/Plaintiff herein from occupying, rescinding(sic) or dealing with the parcel NO Bukhayo/Bugengi/1334 this was done before the statutory period of 12 (twelve) years.”

However, in his submissions MR Namatsi counsel for the Appellant has rubbished those findings by the trial magistrate accusing him of descending into the arena of litigation and basing his decision on extraneous matters. This is how counsel has submitted in paragraph 25:

25: “Furthermore, the Respondents neither brought up any argument concerning BUSIA MC ELC NO 75 of 2019 as a basis for their defence, my lord ours is an adversarial system. In an adversarial legal system the court performs the role of an impartial arbiter. It must therefore not be seen to descend into the arena of conflict by undertaking investigations because that is not a judicial function. Judges, magistrates and Kadhis only exercise judicial authority which is simply the power to hear and determine disputes and make findings on the respective liabilities of the parties before them. To assume any other role would therefore blur the vision of the judicial officers and must be avoided.”

Of course it goes without saying that judicial officers must only act on the basis of the evidence and the law and should not descend into the arena of litigation. In the circumstances of this case, however, it is not correct to submit that the trial magistrate descended into the arena of litigation or that he relied on arguments which the parties did not bring up. The record shows that the plaint in BUSIA CMCC NO 75 of 2019 was among the documents filed herein. It was filed by the Appellant himself vide his supplementary affidavit dated 15th April 2020 and therefore became part of the record. The trial magistrate could not have shut his eyes from that very crucial document. He cannot therefore be said to have descended into the arena of conflict nor relied on matters not brought up. By the time the Originating Summons was filed on 20th March 2020 in the subordinate Court, the Green Card to the suit land shows that the 1st to 2nd Respondents were then the registered proprietors of the suit land. The filing of BUSIA CMCC NO 75 of 2019 on 13th June 2019 against the Appellant by the 2nd Respondent effectively interrupted his occupation and possession of the suit land which by then was only 11 years old. And since the 3rd Respondent was only registered as the proprietor on 24th February 2020, time for purposes of adverse possession could only have started running in his favour from that day. The Appellant's Originating Summons seeking orders that he had acquired the suit land by way of adverse possession was filed only one month after the 3rd Respondent became the registered proprietor thereof. That was well below the 12 years statutory period. Clearly, his claim to the suit land by way of adverse possession was rightly rejected by the trial Court and his appeal must suffer the same fate.

26. By the same token, the Appellant's claim to be compensated in the sum of Kshs.17,345,323.39 by the Respondents being the value of his trees allegedly damaged by the 3rd Respondent was correctly declined by the trial Court. Any interest to the suit land by way of adverse possession in favour of the



Appellant did not crystallize as is now clear from the aforesaid reasons. And since he had no known interest in the suit land, he could not claim any interest in the trees. As was held in *Waribu Chongo v Benson Maina Gathithi* 2014 eKLR:

“It is trite law that whatever is permanently attached to the soil becomes part of the soil and runs with the land; it matters not who affixed or embedded the object. This is captured in the latin maxim *quicquid plantatur solo, solo cedit*. The owner of the land becomes the owner of the soil and all objects permanently affixed or embedded thereto. In a conveyance or sale transaction, all objects affixed and embedded to the land at the time of the contract of sale must be left for the purchaser unless otherwise agreed.”

By the same token, it follows that since the Appellant had not acquired any interest in the suit land, he had no valid claim to the trees or anything embedded therein. Article 260(d) of *the Constitution* defines land to include:

“Natural resources completely contained on or under the surface.”

The trial magistrate did not therefore err in law or in fact when he declined to award the Appellant the sum claimed as value of the trees. As the Appellant’s interest in the suit land by way of adverse had not matured, he could not lay any valid claim to the trees or anything on or below it.

27. The ELC APPEAL NO E008 of 2020 is for dismissal with costs to the 1st, 3rd, 4th, 5th and 6th Respondents.

ELC APPEAL NO E009 OF 2020:

28. Arising out of the same judgment of HON. P. A. Olengo delivered on 1st April 2022 in Busia CM ELC CASE NO 34 of 2020, Anthony Okobwa Dado, Dado Tintin Herbert and Justus Namenya Dado (the Appellants herein as personal representatives to the Estate of Daudi Dado Nyabola) filed this appeal against Mathew Tonado Okech and Equity Bank (K) LTD (the 1st and 2nd Respondents respectively) seeking to set aside the said judgment. They proffered the following eight grounds of appeal:

1. That the learned trial magistrate erred in fact and in law in dismissing the Appellant’s claim against the Respondents notwithstanding the obvious fraud and illegality on the part of the Respondents brought out in evidence.
2. That the learned trial magistrate erred in fact and in law in dismissing the Appellant claim against the 2nd Respondent who did not enter appearance, file defence or tender any evidence in Court.
3. That the learned trial erred in fact and in law in failing to find that the Respondents committed fraud and an illegality while dealing with/making transactions in respect of the land parcel NO Bukhayo/Bugengi/1334.
4. That the learned trial magistrate erred in fact and in law in failing to find that the alleged transaction between the late Daudi Dado Nyabola and the 1st Respondent was void ab initio for lack of Land Control Board Consent the same having been obtained on 30/1/2020 before the alleged making of the agreement on 14/2/2020.
5. That the learned trial magistrate erred in fact and in law in failing to find that the alleged transaction between the late Daudi Dado Nyabola and the 1st Respondent was void ab initio for lack of spousal consent the only two widows having testified that they did not give spousal consent.



6. That the learned trial magistrate erred in fact and in law in dismissing the Appellants' claim by adopting the wrong procedure while proceeding with the entire suit.
 7. That the learned trial magistrate erred in fact and in law in proceeding with the hearing of the case when the late Daudi Dado Nyabola was indisposed and in ICU with a pending application by his counsel on record to cease from acting thus occasioning a great miscarriage of justice.
 8. That the learned trial magistrate erred in fact and in law in disregarding both oral and documentary evidence adduced and thus arriving at the wrong findings and decision.
The Appellants therefore sought that the said judgment be set aside and/or varied and for any other reliefs as the Court may deem fit to grant.
29. The case of the Appellants who substituted Daudi Dado Nyabola is embodied in the statement of claim dated 25th January 2021 and filed by the said Daudi Dado Nyabola on 4th February 2021 against Mathew S Tornado Okech and Equity Bank (K) LTD who were the 3rd and 4th Defendants (the 1st and 2nd Respondents in this appeal).
 30. It was the case of Daudi Dado Nyabola (now substituted with the Appellants) that he had never sold the suit land to Mathew Tornado Okech (the 1st Respondent in this appeal). That the registration of the 1st Respondent as the proprietor of the suit land and the subsequent charging of the title thereto in favour of the 2nd Respondent was fraudulent and illegal.
 31. The particulars of fraud and illegality were pleaded in paragraphs 7(i) to 7(xiv) as follows:
 - i. There was no sale agreement between the 2nd and 3rd Defendants.
 - ii. No consideration was paid to the 2nd Defendant.
 - iii. The 2nd Defendant did not execute any transfer documents in favour of the 3rd Defendant.
 - iv. The 2nd Defendant did not apply for nor obtain the Land Control Board's consent to transfer.
 - v. No transfer documents were submitted for registration.
 - vi. The 2nd Defendant did not pay any stamp duty.
 - vii. The 2nd Defendant never sought nor obtained spousal consent.
 - viii. The 2nd Defendant holds the original land certificate to-date as it was never surrendered nor gazette as having been lost.
 - ix. Registration was obtained notwithstanding the existence of a caution which was withdrawn unprocedurally.
 - x. The charge was effected while there was a restriction and notice of the existence of Busia CMC CASE NO 43 of 2020.
 - xi. That charge was meant to defeat this suit.
 - xii. Taking advantage of the 2nd Defendant.
 - xiii. Registration of defective documents.
 - xiv. Acting unprocedurally and illegally in the transaction.



32. The 2nd Defendant therefore counter claimed against the 3rd and 4th Defendants judgment in the following terms:
- a. An order be issued for the cancellation of the registration of the 3rd Defendant as the owner of the land parcel NO Bukhayo/Bugengi/1334 and thereafter restore the registration and ownership to the 2nd Defendant.
 - b. The charging of the title to the 4th Defendant by the 3rd Defendant be and is hereby declared a nullity and the 3rd Defendant do provide an alternative security.
 - c. That a permanent injunction be issued against the 3rd Defendant restraining him, his agents from interfering with the 2nd Defendant's use of the subject matter.
 - d. Costs.

The 3rd Defendant (the 1st Respondent in this appeal) filed a defence to the counter-claim in which he pleaded, inter alia, that he is the current registered proprietor of the suit land since 24th February 2020 although the same was previously registered in the name of the 2nd Defendant (now represented by the Appellants). That the suit land is now charged in favour of the 4th Defendant (the 2nd Respondent in the appeal). He denied that the suit land was registered in his names fraudulently or illegally and in particular, he denied the particulars of fraud as enumerated in paragraphs 7(i) to 7(xiv) of the counter-claim and put the Appellants to strict proof thereof. To the contrary, he pleaded that his acquisition of the suit land was above board as confirmed by persons authorized to effect such transfers. That Daudi Dado Nyabola as represented by the Appellants herein disposed of his interest in the suit land willingly and at a consideration and is not entitled to the reliefs sought vide his counter-claim which is an afterthought instigated by persons who are known and un-known with a view to distorting the issues herein. That the issues being sought in the counter-claim are pending determination and are therefore sub-judice having been raised in the Originating Summons. The counter-claim is therefore bad in law, does not disclose any cause of action and should be dismissed with costs.

33. The 2nd Defendant which is the 2nd Respondent in this appeal did not file any pleadings in response to the counter-claim.
34. The counter-claim by the 2nd Defendant, as represented by the Appellants, was also considered by the trial magistrate in the impugned judgment.
35. On the issue of fraud, the trial magistrate was satisfied that the Police had investigated the allegations that the 1st and 2nd Respondents had acquired the suit land fraudulently and exonerated him having found that the said Daudi Dado Nyabola had in fact signed the sale agreement and other documents. This was also confirmed by the Land Registrar MR Wilfred Nyaberi. On the issue of lack of spousal consent, the trial magistrate found that the suit land was not matrimonial property. With regard to payment of Stamp Duty, the trial magistrate found that the same was paid by the 1st Respondent's agent one Musa Mayembe Odima. The trial magistrate also made a finding that the original title deed to the suit land was destroyed by the Land Registrar who testified during the trial and who also confirmed that the 1st Respondent obtained a good title to the suit land after the said Daudi Dado Nyabola had executed all the documents including obtaining the consent of the Land Control Board. He therefore found that the 1st Respondent's title to the suit land was obtained procedurally and dismissed the Appellants counter-claim with costs.
36. That dismissal prompted this appeal on the grounds already set out above.



37. I will again start with the issue raised by MR Namatsi, and which I have already addressed earlier, as to whether the impugned judgment was signed, dated and delivered in open Court. As I have already stated above, although the typed copy of the impugned judgment and which is what the Appellant has filed is not signed, the handwritten judgment is duly dated, signed and reads that it was delivered in open Court in the presence of both MR OKUTTA and MR SIBALA who was holding brief for MR FWAYA. There is therefore a valid judgment before me for consideration in this appeal.
38. Having looked at the grounds of appeal herein, I discern the following to be the issues for my determination in this appeal:
1. Whether the trial magistrate erred in law and in fact in dismissing the Appellant's claim against the 2nd Respondent who did not enter appearance or file a defence.
 2. Whether the trial magistrate erred in law and in fact in proceeding with the hearing of the case when Daudi Dado Nyabola was indisposed and in ICU pending an application by his counsel to cease acting.
 3. Whether the trial magistrate erred in law and in fact in failing to find that fraud and illegality had been proved against the Respondents in the manner in which the suit land was acquired by the 1st Respondent.
 4. Whether the trial magistrate erred in law and in fact by directing oral and documentary evidence.

I will consider the above issues in that sequence:

1. Dismissing Appellant's Case Against The 2nd Respondent Who Did Not Enter Appearance Or File A Defence:

39. It is true that Equity Bank (K) LTD who are the 2nd Respondent in this appeal did not enter appearance or file any defence in the case subject of this appeal. Indeed they did not participate in the trial. On that issue, MR WERE has submitted as follows in the page 11 of his submissions:

“The 4th Defendant in the lower Court Equity Bank (K) LTD did not enter appearance. They did not defend the suit or the claim by the late Daudi Dado Nyabola. Such claim was therefore un-opposed and should have been allowed without saying much. Unfortunately, nothing was said about it by the trial magistrate”.

No authority was cited for that proposition by MR. WERE submitting on behalf of the Appellants. It cannot be correct that the Court, as a matter of course, must always enter judgment for the Plaintiff in a suit which is not defended. That would be a dangerous precedent which would mean that a Plaintiff can obtain a judgment in his favour even in a suit which is statute barred, simply because the Defendant did not defend the claim against him. Whether a suit is defended or not, the Plaintiff must still prove his case to the required standard which, in civil cases, is that the Plaintiff's claim must be proved on the balance of probability. Therefore, notwithstanding the absence of a defence or evidence to rebut the Plaintiff's claim, unless it is a case where, for example, the doctrine of *res ipsa loquitur* is applicable or the Court can decide, without much ado, that the Plaintiff's case is truly established, the burden will always remain on the Plaintiff to lead sufficient evidence to prove his case with or without a defence. In the case of *Charter House Bank Ltd (under Statutory Management) V Frank N. Kamau 2016 eKLR*,



the Court of Appeal had occasion to consider the burden in proof where the Defendant failed to adduce evidence. It said:

“We would therefore venture to suggest that before the trial Court can conclude that the Plaintiff’s case is not controverted or is proved on a balance of probabilities by reasons of the Defendant’s failure to call evidence, the Court must be satisfied that the Plaintiff has adduced some credible and believable evidence which can stand in the absence of rebuttal evidence by the Defendant ...

The Plaintiff must adduce evidence which in the absence of rebuttal evidence by the Defendant convinces the Court that on a balance of probabilities, it proves the claim. Without such evidence, the Plaintiff is not entitled to a judgment merely because the Defendant has not testified.” Emphasis mine.

Having said so, was there any evidence to support the counter-claim by Daudi Dado Nyabola (now represented by the Appellants) against Equity Bank (K) LTD (the 2nd Respondent) notwithstanding the fact that the said 2nd Respondent (4th Defendant in the suit) did not testify? As can be gleaned from the allegations of fraud and illegalities pleaded by Daudi Dado Nyabola in his counter-claim dated 25th January 2021 and specifically in paragraphs 7(i) to 7(xiv), none of them is pleaded as against the said Equity Bank (K) LTD. Those allegations are all leveled against the 1st Respondent. And even when he testified after being substituted in place of the deceased Daudi Dado Nyabola, his son Anthony OKOBA Dado (DW5), one of the Administrators to the deceased’s Estate, did not allege any fraud or illegality on the part of Equity Bank (K) LTD. Indeed in his statement dated 11th August 2020 which was adopted by Anthony Okobwa Dado (DW5) during the hearing, the said Daudi Dado Nyabola restricted his testimony to the cancellation of the title deed issued to the 1st Respondent herein MathewS Tonado Okech on the ground that he (Daudi Dado Nyabola) was the lawful owner of the suit land which he had never sold. There was no evidence led by the said Daudi Dado Nyabola or, the Appellants who substituted him, to suggest that Equity Bank (K) LTD had fraudulently or illegally been involved in the acquisition of the title to the suit land by MathewS Tonado Okech or in the charging of the title to the said Bank.

40. Given those circumstances, and notwithstanding the fact that the said Equity Bank (K) LTD did not file any defence, the suit against it was clearly for dismissal. The trial magistrate did not err in law or in fact by doing so.

2. Proceeding With The Hearing When Daudi Dado Nyabola Was Indisposed:

41. The trial magistrate has been assailed for continuing with the hearing when Daudi Dado Nyabola was indisposed and in hospital.
42. I have perused the record in the trial Court. On 24th February 2021 MR FWAYA appearing with MR Were for Daudi Dado Nyabola sought an adjournment on the ground that their client was un-well. MR Okeyo and MR Okutta objected to the application. Having heard the counsel present, the trial magistrate allowed the adjournment but marked it as the last adjournment. The parties then agreed to resume the hearing to 26th March 2021.
43. On that day, however MR Fwaya again sought an adjournment on the ground that his client was in the Intensive Care Unit (ICU). Counsel sought time to cease acting for him adding that he had filed an application dated 26th March 2021 to that effect and needed it to be fixed for hearing. The Court directed that the said application be heard on 28th April 2021. Meanwhile, MR FWAYA asked that it be recorded that he had “walked out of the matter.” That was done and on the same day MR Benard



Mwendwa (DW4) a superintendent of Police attached to the directorate of Criminal Investigations (DCIO) Busia testified. He was examined by both MR Namatsi, MR Okutta and MR Okeyo. In the meantime, MR Fwaya's application dated 26th March 2021 in which he sought orders to cease acting for Daudi Dado Nyabola was allowed on 28th April 2021.

44. On 29th September 2021 MR FWAYA appeared before the trial Court and informed the magistrate that he had filed an application dated 24th September 2021 seeking, inter alia, to substitute the deceased Daudi Dado Nyabola with his sons Anthony Okobwa Dado HERERT Tintin Dado and Justus Namenya Dado and further, for them to be allowed to prosecute the counter-claim filed by their deceased father against MathewS Tonado Okech and that the pending judgment suspended and the substitutes be allowed to prosecute their deceased father's counter-claim. By a ruling delivered on 10th November 2021, the trial magistrate granted those prayers but declined the prayer to expunge from the record the proceedings from 10th February 2020 stating, and rightly so, that by that date, this suit had not even been filed. The hearing continued on 24th November 2021 with MR FWAYA back on record for the substitutes (the Appellants herein whose evidence was adduced by Anthony Okobwa Dado (DW5). They also called their witness Dorcas Nasi (DW6) one of the wives of Daudi Dado Nyabola in support of their counter-claim before MR Fwaya closed their case on 12th January 2022 and sought for 30 days to file his submissions which was allowed by the trial Court. Thereafter, the impugned judgment was delivered.
45. I have gone at length to summarize the proceedings from 24th February 2021 because they are relevant to this ground of appeal. It is clear that MR FWAYA was irked by the refusal of the trial magistrate to grant him an adjournment. The grant of an adjournment is within the discretion of the trial Court. I do not think that the proper route for a party or counsel whose application for adjournment has been declined is to walk out of the proceedings. That would be considered disrespectful. There is always the option of an appeal or a review against any ruling that may have been made by the trial Court. In this case, the record shows that MR FWAYA came back on record and proceeded with the trial from where it had reached. No application was made to recall for cross-examination MR Benard Mwendwa (DW4) the Superintendent of Police who had testified in the absence of MR FWAYA. And of course no appeal was filed against the trial magistrate's ruling delivered on 26th March 2021 in which the trial Court declined the application for adjournment. Indeed in that ruling, the trial magistrate had even stated that:

“The advocate will have a chance to cross-examine the witness. He can also apply for the witness to be recalled should the need be to testify again in his presence. It is not the first time the matter is proceeding in the absence of the 2nd Defendant. It had happened before.”

46. As is clear, the trial Court had even left the option open for counsel to cross-examine the witness who had testified in his absence. That option was not taken up and that witness being the only one who testified on 26th March 2021, the Appellants cannot be heard, in the circumstances, to complain that the trial proceeded in the absence of Daudi Dado Nyabola when an opportunity to re-call him was made available but was not taken up.
47. That ground of appeal is devoid of merit and is dismissed.

3.Failure By The Trial Magistrate To Find That Fraud And Illegality Had Been Proved Against The 1st Respondent:

48. The Appellants have taken issue with the trial magistrate for failing to find that Mathew Tonado Okech (the 3rd Respondent in ELC Appeal NO E008 of 2022 who is also the 1st Respondent in ELC Appeal



NO E009 of 2022) had obtained the suit land fraudulently and illegality from Daudi Dado Nyabola. Among the allegations of fraud and illegality raised against the 1st Respondent and which were the subject of the Appellants' counter claim dated 25th January 2021 against the 1st Respondent and Equity Bank (K) LTD who are the 2nd Respondent in ELC Appeal NO E009 of 2022. The illegality against the above Respondents as particularized in the claim by Daudi Dado Nyabola (now represented by the Appellants) included the following: There was no sale agreement between Daudi Dado Nyabola and Mathew Tonado Okech. No consideration was paid nor spousal consent obtained. No appropriate transfer documents were executed nor consent of the Land Control Board obtained. No stamp-duty was paid and Daudi Dado Nyabola was still holding the original title document and the registration in favour of Mathew Tonado Okech was done un-procedurally while there was a caution. The charge in favour of Equity Bank (K) LTD was effected while there was a restriction.

In his statement in support of his counter-claim and which was adopted by the Appellants during the trial the deceased Daudi Dado Nyabola denied having sold the suit land to the 1st Respondent or to any other person. He also denied having sworn an affidavit dated 31st March 2020 allegedly admitting to having sold the suit land to the 1st Respondent.

49. In response to the counter-claim by Daudi Dado Nyabola, the 1st Respondent had filed a defence to the counter claim in which he denied that the registration of the suit land in his name was done fraudulently or illegally. He denied all the allegations of fraud or illegality leveled against him and relied on his statement dated 22nd February 2021 in which he had stated how Daudi Dado Nyabola had approached him in late December 2019 through his (Nyabola's) right hand man offering to sell to him the suit land. After negotiation, the 1st Respondent agreed to purchase the suit land and they executed a sale agreement on 14th February 2020 and after due compliance, the title to the suit land was transferred to him. Later, Daudi Dado Nyabola reported to the Police and denied having sold the suit land to the 1st Respondent alleging that the 1st Respondent had obtained it fraudulently. The Police investigated those allegations of fraud and came up with a report. He had called as his witness MR Wilfred Nyadoro Nyaberi (DW1) the Land Registrar Busia and MR Benard Mwendwa (DW4) a superintendent of Police attached to the Directorate of Criminal Investigations Office (DCIO) Matayos.
50. The trial magistrate considered that testimony and arrived at the conclusion that those allegations of fraud and illegality had not been proved to the required standard to impute any impropriety in the manner in which the 1st Respondent acquired the suit land. In arriving at that decision, the trial magistrate was satisfied with the evidence of the 1st Respondent's witnesses MR Wilfred Nyaberi (DW1) the Land Registrar and Mr Benard Mwendwa (dw4) DCIO Matayos.
51. The Appellants fault the trial magistrate for not finding that the allegations of fraud and illegality had been proved against the 1st Respondent in the manner in which he acquired the suit land. Fraud is a serious offence. The standard of proof where fraud is alleged in civil matters is higher than the ordinary standard of balance of probability. In the case of Gladys Wanjiru Ngacha V Teresa Chepsat & Others 2013 eKLR, it was held that:

“Allegations 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.”

See also *Vijay Morjaria V Nasing Madhusing Darbar & Others* C.A. Civil Appeal NO 106 of 2000 [2000 eKLR]. And also *Central Bank Of Kenya Ltd –V- Trust Bank Ltd & Others* C.A. Civil Appeal NO 215 of 1996 among other cases.



52. Among the allegations of fraud and illegality pleaded by Daudi Dado Nyabola against the 1st Respondent in the trial Court included that there was no sale agreement executed between them. Further, that neither the spousal consent nor that of the Land Control Board were obtained as required. That Daudi Dado Nyabola was still holding the original land certificate and the suit land was sold notwithstanding the existence of a caution which was withdrawn un-procedurally. It was also pleaded that the 1st Respondent took advantage of the ignorance of Daudi Dado Nyabola in effecting the transfer of the suit and to himself etc. I have already earlier in this judgment cited those allegations in extenso. The burden was therefore on Daudi Dado Nyabola to prove those allegations as is required under Sections 107 and 108 of the *Evidence Act*. Daudi Dado Nyabola was already deceased at the time of the trial and his son Anthony Okobwa Dado (DW5) testified on his behalf and adopted his own statement dated 26th November 2021 as well as that of his father dated 25th January 2021. The gist of those statements being that Daudi Dado Nyabola did not sell the suit land to the 1st Respondent.
53. There is however on record the evidence of MR Wilfred Nyaberi (DW1) the Land Registrar Busia. He testified before the trial Court and adopted as his evidence the contents of his statement dated 25th May 2020. In that statement, he confirms how David Dado Nyabola personally appeared before him with properly executed documents and confirmed that he had sold the suit land to the 1st Respondent. There had been a previous restriction placed on the suit land by one Charles Maana but which was later removed by a letter. Nonetheless, the Land Registrar insisted that Daudi Dado Nyabola must personally appear in his office. MR Wilfred Nyaberi (DW1) goes on to state in his statement that:

“After Two days, he appeared in my office accompanied by the same person who I didn’t know, he confirmed to me that he had transferred the land to MR Mathew Tonado Okech then I told him to go to an Advocate, swear an affidavit and deed of indemnity to the effect that he had sold the land. He did that and presented them before me. I asked him about the other transfer which he denied having executed apart from the one he had done for Mathew Okech for the two panels of land quoted above.

Later around April 2020, I received a letter from the office of DCI Busia requesting to be supplied with transfer documents for two panels of land. I did supply them with all the relevant documents, equally later Nyabola came to the office requesting for the same documents through his lawyer Fwaya & Co Advocates. At the same time MR David Nyabola insisted that he had not sold any of his land as he is a rich man and he won’t sell land, I called my staff whom were well known to him who confirmed to him that he appeared then he changed his mind and told me to assist him recover the lands.

He wanted men (sic) to tell him what I wanted and he was willing to offer so that I could assist him to have the lands again transferred to his names. I declined to agree with him but he told me he could come again but since then, I have not seen him.”

When the witness testified, he confirmed having seen the sale agreement between Daudi Dado Nyabola and the 1st Respondent in respect to the suit land. That agreement was dated 14th February 2020 showing the purchase price of Kshs.5,000,000 as well as the consent of Land Control Board and other documents. The Green Card to the suit land shows that the caution placed thereon by one Charles Magaa on 1st March 2019 had been removed by the time the said land was registered in the name of the 1st Respondent on 24th February 2020. Another restriction was however placed thereon on 27th February 2020 by Charles Patrick Maana until a case which he had reported has been determined. It must be remembered that only Daudi Dado Nyabola could have controverted the testimony of Wilfred Nyaberi the Land Registrar Busia about what transpired between them in the Lands Office Busia with respect to the suit land. However, there is no evidence suggesting that the said Land Registrar had any



motive to give false evidence with respect to how the 1st Respondent acquired ownership of the suit land.

54. Then there is the evidence of superintendent (S.P) Benard Mwendwa (DW4) the District Criminal Investigation Officer (DCIO) Matayos. His testimony is that following a complaint by Daudi Dado Nyabola that the suit land had been fraudulently transferred, he commenced investigations. He obtained documents including a land sale agreement, identity card, specimen signatures, application for Land Control Board Consent and Transfer of Land Form, which he then transmitted for examination by the Forensic Document Examiner one JOHN MUIINDE who subsequently filed his report. Arising out of that report, SP BENARD MWENDWA (DW4) made the decision that DAVID Dado Nyabola had given false information to a public officer and should be charged. However, the office of the Director of Public Prosecution (ODPP) advised that the matter be pursued in a Civil Court.
55. I have perused the report of John Muinde dated 16th June 2020 and which was produced as an exhibit in the trial Court. Among the findings by the said Document Examiner was that Daudi Dado Nyabola signed the sale agreement executed between himself and the 1st Respondent for the purchase of the suit land on 14th February 2020. Paragraphs two (2) and three (3) of that report are crucial in determining whether or not the trial Court arrived at the correct decision in respect to the counter-claim by Daudi Dado Nyabola. They read as follows:

“The two inquiry files were opened following a complaint from one Mr David Dado Nyabola that one person by the name MathewS Tonado Juma a businessman in Busia town had fraudulently procured land title deeds for the parcels of land number Bukhayo/Bugengi/1190 and Bukhayo/Bugengi/1334 respectively. Intensive investigations were carried out in both cases and it came out clearly that the complainant had actually sold the two parcels of land knowingly and amount of money paid in cash amounting to Kshs.1.5 million and Kshs.5 million shillings respectively and in the presence of many witnesses who have recorded their statements to that effect”.

The inclusion of the name Juma can only be an error because the 1st Respondent’s last name is actually Okech not Juma. Again, fraud is in fact a criminal offence. The Directorate of Criminal Investigations is the agency most equipped to investigate such an offence. In view of the report by MR John Muinde exonerating the 1st Respondent from any fraudulent activity in the manner in which he acquired the suit land, there was no evidence upon which the trial magistrate would have found that the allegations of fraud and illegality had been proved by the said Daudi Dado Nyabola against the 1st Respondent as pleaded in his counter-claim. All those issues were considered by the trial magistrate at pages 188 – 189 of his judgment (as per the record of appeal). He considered the evidence of S.P Benard Mwendwa (DW4) and the Land Registrar Mr Wilfred Nyaberi (DW1) and came to the conclusion, rightly so in my view, that not only did Daudi Dado Nyabola execute all the necessary documents transferring the suit land to the 3rd Respondent but further, that he had been paid the purchase price of Kshs.5,000,000. That was the only inevitable conclusion which the trial magistrate could have arrived at on the basis of the evidence before him.

56. On the issue of spousal consent, it has been submitted on behalf of the Estate of Daudi Dado Nyabola at page 7 of the submissions by MR Were that:

“No spousal consent was obtained in respect of the alleged transaction between the late Daudi Dado Nyabola and one Mathew Tonado Okech. The Land Registrar testified that he requested the landowner to appear before him. There is no evidence that was led that there



was a spousal consent. On cross-examination, he admitted that it was necessary to get spousal consent. The two widows to the late David Dado Nyabola led by Dorcas Nasi NDado and the Administrators testified that there was no spousal consent that was sought.”

Counsel for the 1st Respondent submitted that the suit land was commercial property and so no spousal consent was required. As the trial magistrate found, there was no evidence to show that the suit land was matrimonial property which, by law, is the matrimonial home or household goods therein or any other immovable property jointly owned and acquired during the subsistence of a marriage between Daudi Dado Nyabola and his spouses. Indeed when she testified before the trial magistrate on 12th January 2022, one of Daudi Dado Nyabola’s wives Dorcas Nasi (DW6) said in her evidence in chief that:

“I know Daudi Dado Nyabola. He was my husband. I had two co-wives. They were Mary Nabwire And Patricia Nyongesa. I am the 3rd wife. There was no one living in Uganda. Dado died on 27/3/2021. This is my statement. It talks about Bukhayo/Bugengi/1334. It belonged to the deceased. I am not aware he sold it. He did not sell it. We have the original title deed. I did not consent to the sale of the land.”

When she was cross-examined by Mr Okutta, she said:

“I am 3rd wife. Patricia is the 2nd. I don’t know the one in Uganda. He bought land from ADOKA Mbomere. It is not ancestral land. He bought it. He registered it in his name. I do not know who planted trees therein. I can’t tell if it was Ouma ADOKA who planted the trees.”

It is also instructive to note that even in his own statement dated 11th August 2020 and which was adopted by his son Anthony Okobwa Dado (DW5), there was no mention by Daudi Dado Nyabola that the suit land was matrimonial property. The issue of spousal consent was only brought up by Anthony Okobwa Dado (DW5) in his statement dated 25th January 2021 signed jointly with his siblings DadoH Tintin Herbert and Justus Namenya Dado. However, in the absence of any evidence that the suit land was matrimonial property, any reference to the requirement of spousal consent having been necessary in the sale agreement between Daudi Dado Nyabola and the 1st Respondent with respect to the suit land can only be treated as hollow.

4. Trial Magistrate Disregarded Both The Oral and Documentary Evidence:

57. From the record and the judgment of the trial magistrate, it is clear that he considered all the relevant oral and documentary evidence adduced by the parties. It has not been shown by the Appellants which testimony of Daudi Dado Nyabola as adopted by the Administrators to his Estate and who are the Appellants herein was not considered by the trial magistrate in determining his counter-claim against Mathew Tonado Oketch who was the 3rd Defendant in the suit before the trial magistrate, the 3rd Respondent in ELC Appeal NO E008 of 2022 and the 1st Respondent in ELC Appeal NO E009 of 2022.
58. The main issues raised by the Appellants in ELC APPEAL NO E009 of 2022 centered on fraud and illegality on the part of Mathew Tonado Oketch in the manner in which he acquired the suit land. The trial magistrate, as is clear from his judgment, considered both the oral evidence as well as the documents filed and came to the conclusion that Mathew Tonado Oketch obtained a good title to the suit land. In light of the cogent evidence adduced both by the Land Registrar and the Document Examiner, the conclusion by the trial magistrate was inevitable. This Court has no reason to fault him.



59. The trial magistrate also found, and rightly so, that the suit land was not matrimonial property and therefore spousal consent was not a pre-requisite before the same could be transferred. He found also that the original title to the suit land had been surrendered and destroyed before Mathew Tonado Oketch was issued with his title. In any event, if the old title was still in the custody of the Appellants, the onus lay with them to avail it for the trial Court's inspection. The Court was also satisfied that Stamp Duty had been paid. The trial Court saw and observed the demeanor of the two crucial witnesses in that regard being the Land Registrar and the Document Examiner and believed them. This Court has no reason to doubt the trial Court's assessment of their credibility. On the other hand, the record shows that the said Daudi Dado Nyabola swore a replying affidavit in BUSIA CM CC ELC CASE NO 34 of 2020 dated 31st March 2020 in which at paragraph 6 thereof, he deposed as follows, with respect to the suit land:

“That I sold my interest on the said parcel of land to none other than MathewS Tonado Okech”.

That affidavit was drawn and filed by the firm of Ouma-Okutta Advocates. Five months later, he swore another affidavit dated 10th August 2020 drawn by the firm of Gabriel Fwaya Advocates in which he deposed in paragraph 6, 7 and 8 as follows;

- 6: “That I have never instructed or paid MR Okutta ADVOCATES to act for me in this matter.”
- 7: “That I did not sign the affidavit drawn and filed by Ouma Okutta & Associates on 31/3/2020 annexed hereto is a copy marked DD-2”.
- 8: “That I pray that the replying affidavit allegedly sworn by me on 31/3/2020 be expunged from the record”.

His son and Administrator adopted this latter affidavit as his evidence. An affidavit is a solemn document and a party who swears two contradictory affidavits cannot be regarded as reliable. And although the said Daudi Dado Nyabola was deceased by the time the trial took place, none of those two affidavits and more so the one adopted by his son Anthony Okobwa Dado (DW5) reflects his testimony in good light. This is especially taking into account the fact that neither Anthony Okobwa Dado (DW5) nor any of his siblings were privy to what transpired between Daudi Dado Nyabola, the Land Registrar and Mathew Tonado Oketch with respect to the suit land. Taking all the above into account, the dismissal of the counter-claim by Daudi Dado Nyabola against Mathew Tonado Oketch was inevitable. By the same token BUSIA ELC APPEAL NO E009 of 2022 is devoid of merits. It is for dismissal.

60. Ultimately therefore and having considered the two appeals, the Court makes the following disposal orders:

1. ELC Appeal No. E008 of 2022 is dismissed with costs both here and in the subordinate Court to:
 1. Ouma Adoka Mbomere – 1st Respondent.
 2. Mathew Tonado Oketch – 3rd Respondent.
 3. Anthony Okobwa Dado – 4th Respondent.
 4. Herbert Tintin Dado – 5th Respondent.
 5. Justus Namenya Dado – 6th Respondent.



2. ELC Appeal No. E009 of 2002 is dismissed with costs here and in the subordinate Court to only Mathew Tornado Oketch who was the 1st Respondent in this appeal and also the 3rd Respondent in ELC Appeal No E008 of 2022.

BOAZ N. OLAO

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 9TH DAY OF MAY 2024 WITH NOTICE TO THE PARTIES.

Right of Appeal.

BOAZ N. OLAO

JUDGE

Explanatory notes;

This Judgment was due on 15th February 2024. However, I was away from the station attending to my late step-mother who unfortunately passed away on 14th March 2024 and was laid to rest on 30th March 2024. The delay therefore was inevitable and the same is regretted.

BOAZ N. OLAO

JUDGE

