



**Awuonda v Owuoth & 2 others (Environment and Land Appeal
E001 of 2023) [2025] KEELC 5421 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5421 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E001 OF 2023
SO OKONG'O, J
JULY 17, 2025**

BETWEEN

JEFFREY OMONDI AWUONDA APPELLANT

AND

ROBERT LEE ADUMA OWUOTH 1ST RESPONDENT

JOYCE NABWIRE MAJANJA 2ND RESPONDENT

LAND REGISTRAR, NYANDO 3RD RESPONDENT

*(Being an appeal from the judgment and decree of Hon. L.N. Kiniale SPM
delivered on 5th September 2023 in Nyando SPMC ELC NO. 60 OF 2021)*

JUDGMENT

Background

1. The Appellant filed a suit against the Respondents at the Senior Principal Magistrate's Court at Nyando, being Nyando SPMC ELC No. 60 of 2021 (hereinafter referred to as "the lower court suit") seeking the following reliefs;
 1. Surrender of the original title for the parcel of land known as Title No. Kisumu/Kochieng/4201 in the names of the 1st and 2nd Respondents.
 2. Consequent to prayer (1) above being granted, the 3rd Respondent be ordered to cancel the title for the said parcel of land and revert the same into the name of the deceased, Jeremiah Opon Odep.
 3. General damages.
 4. Costs of the suit.



5. Any other relief the honourable court may deem fit to grant.
2. The Appellant averred that he had brought the suit in his capacity as the administrator of the estate of Jeremiah Opon Odep (deceased) (hereinafter referred to only as “the deceased”), who died on 25th August 2004. The Appellant averred that he was issued with a Grant of Letters of Administration in Nyando Senior Principal Magistrate’s Court Succession Cause No. 77 of 2017. The Appellant averred that at all material times, the deceased was the registered owner of all that parcel of land known as Title No. Kisumu/Kochieng/2678 measuring 0.52 Ha. (hereinafter referred to as “the suit property”).
3. The Appellant averred that sometime in 2017, he realised that the 1st and 2nd Respondents had colluded with the 3rd Respondent and subdivided the suit property into two portions namely; Title No. Kisumu/Kochieng/4200 and Title No. Kisumu/Kochieng/4201. The Appellant averred that the subdivision was done on 19th September 2005 one year after the death of the deceased. The Appellant averred that the 1st and 2nd Respondents thereafter caused Title No. Kisumu/Kochieng/4201 to be transferred into their names on 3rd April 2006 two years after the death of the deceased. The Appellant contended that the process of subdivision of the suit property and the subsequent transfer of Title No. Kisumu/Kochieng/4201 into the names of the 1st and 2nd Respondents was irregular and involved forgery.
4. The 1st and 2nd Respondents filed a joint statement of defence on 14th February 2022. The 1st and 2nd Respondents denied the allegations of wrongdoing made against them in the plaint. The 1st and 2nd Respondents averred that the deceased sold to the 1st Respondent a portion of the suit property on 26th November 2000 at a consideration of Kshs. 80,000/-, which amount was paid in two instalments of Kshs. 50,000/- and Kshs. 30,000/-. The 1st and 2nd Respondents averred that the last instalment of Kshs. 30,000/- was paid by the 1st Respondent to the deceased on 7th February 2001 in the presence of the Appellant and his mother, Margaret Awuonda, both of whom signed the payment receipt acknowledgement. The 1st and 2nd Respondents averred that the Appellant was fully aware of the Respondents’ acquisition of the suit property. The 1st and 2nd Respondents contended that the suit was brought in bad faith.
5. The 1st and 2nd Respondents averred that pursuant to the said agreement of sale dated 26th November 2000, the proprietary interest in the portion of the suit property that was sold to the 1st Respondent by the deceased was properly conveyed to the 1st Respondent upon full payment of the agreed consideration. The 1st and 2nd Respondents averred that the deceased sought and obtained the various approvals necessary for the subdivision of the suit property. The 1st and 2nd Respondents averred that they acquired the portion of the suit property known as Title No. Kisumu/Kochieng/4201 lawfully and procedurally with the consent and participation of the deceased. The 1st and 2nd Respondents averred that their registration as the proprietors of Title No. Kisumu/Kochieng/4201 conferred upon them an absolute and indefeasible interest in the property. The 1st and 2nd Respondents prayed that the Appellant’s suit be dismissed with costs. The 3rd Respondent neither entered an appearance nor filed a defence.
6. The lower court heard the suit and delivered a judgment on 5th September 2023. The lower court dismissed the Appellant’s suit with costs to the 1st and 2nd Respondents. The lower court found that the Appellant had failed to prove his case against the Respondents on a balance of probabilities. The court found that the Appellant did not establish any valid ground that would defeat the title held by the 1st and 2nd Respondents in respect of Title No. Kisumu/Kochieng/4201. The court found that the Appellant alleged forgery and illegality in the acquisition of Title No. Kisumu/Kochieng/4201 by the 1st and 2nd Respondents, but did not provide any particulars thereof.



The appeal

7. The Appellant was aggrieved by the decision of the lower court and preferred the present appeal. In his Memorandum of Appeal dated 3rd October 2023, the Appellant challenged the lower court's judgment on the following grounds;
 1. The Learned Magistrate erred in law and fact by wrongly evaluating the evidence on record and hence coming to a wrong conclusion.
 2. The Learned Magistrate erred in law and fact in failing to find that the dealings with the suit property, which were the subject of the suit, were carried out after the death of the proprietor on 25th August 2004 without a Grant of Letters of Administration, hence null and void.
 3. The Learned Magistrate erred in law and fact in failing to find fraud on the part of the Respondents, while fraud could be discerned from the documents produced in court.
 4. The judgment of the Learned Magistrate was contrary to the law.
8. The Appellant prayed that the appeal be allowed and the judgment of the lower court be set aside, and in its place, judgment be entered for the Appellant as prayed in the plaint with costs.
9. The appeal was heard by way of written submissions. The Appellant filed submissions dated 8th October 2024 while the 1st and 2nd Respondents filed submissions dated 18th December 2024.

Appellant's submissions

10. The Appellant submitted that the proprietor of the suit property, Jeremiah Opon Odep, deceased (the deceased) died on 25th August 2004. The Appellant submitted that it was not disputed that the suit property was subdivided after the death of the deceased on 3rd April 2006. The Appellant submitted that the Respondents did not furnish the court with evidence showing that there was an application for consent of the Land Control Board to transfer the suit property to the 1st and 2nd Respondents, and that the deceased executed the instrument of transfer of Title No. Kisumu/Kochieng/4201 to the 1st and 2nd Respondents.
11. The Appellant submitted that the only way the 1st and 2nd Respondents could obtain title to the portion of the suit property they allegedly bought from the deceased was through succession, where they would have been considered as debtors of the estate of the deceased. In support of this submission, the Appellant cited Section 45 of the *Law of Succession Act*, Chapter 160 Laws of Kenya. The Appellant submitted that it was not possible for Title No. Kisumu/Kochieng/4201 to have been transferred to the 1st and 2nd Respondents when the deceased died before the subdivision of the suit property could be done. The Appellant submitted that Title No. Kisumu /Kochieng/4201 was registered in the names of the 1st and 2nd Respondents through fraud and misrepresentation. The Appellant averred that the title acquired by the 1st and 2nd Respondents in that manner could not enjoy the protection accorded to a registered owner of land. In support of this submission, the Appellants cited *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* [2015] eKLR and Section 26 of the *Land Registration Act*. The Appellant submitted that he proved his case before the lower court on a balance of probabilities and prayed that the judgment of the trial court be set aside.

The 1st and 2nd Respondents' submissions

12. On ground one of appeal, the 1st and 2nd Respondents submitted that the Appellant did not produce any evidence giving him the locus standi to institute the lower court suit on behalf of the estate of the



deceased. In support of this submission, the 1st and 2nd Respondents cited [Kenneth Nyanga Mwiye v Austin Kiguta and Others](#) [2015] eKLR. The 1st and 2nd Respondents submitted that the Appellant's failure to produce in evidence a Grant of Letters of Administration issued to him in respect of the estate of the deceased rendered the lower court suit, as well as this appeal, incompetent for want of locus standi. The 1st and 2nd Respondents submitted that the Appellant did not bring this appeal as the legal representative of the deceased but rather in his personal capacity.

13. On ground two of appeal, the 1st and 2nd Respondents submitted that this ground must fail because the Appellant had admitted that the deceased had applied for the consent of the Land Control Board on 11th August 2004 while he was alive. The 1st and 2nd Respondents submitted that they produced evidence showing that the deceased applied for the subdivision of the suit property and consent to transfer the suit property to the 1st and 2nd Respondents before he died.
14. On ground three of appeal, the 1st and 2nd Respondents submitted that the Appellant failed to plead fraud in the plaint. In support of this submission, the 1st and 2nd Respondents cited [Demutilla Nanyama Pururmu v Salim Mohamed Salim](#) [2021] eKLR. The 1st and 2nd Respondents submitted that they were the registered proprietors of a portion of the suit property whose title deed was issued on 3rd April 2006. The 1st and 2nd Respondents submitted that they were protected under Article 40 (1) and (2) of the [Constitution](#) and Section 26 (1) of the [Land Registration Act](#) 2012.

Analysis and Determination

15. I have considered the pleadings and the proceedings of the lower court, the judgment of the court, the memorandum of appeal filed by the Appellant and the submissions by the advocates for the parties. This being a first appeal, this court must reconsider and re-evaluate the evidence on record and draw its conclusions on the issues that were raised for determination before the lower court. In [Kenya Ports Authority v Kuston \(Kenya\) Limited](#) [2009] 2 EA 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.”

16. 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] EA 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.
17. In [Makube v Nyamuro](#)[1983] KLR 403, it was held that the appellate 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 also, [Peter v Sunday Post Ltd.](#) [1958] EA 424.
18. I will summarise the Appellant's four (4) grounds of appeal into two (2) grounds, namely, whether the lower court erred in its finding that the Appellant had not proved his case against the Respondents, and in dismissing the Appellant's suit. Title No. Kisumu/Kochieng/4201, which was in dispute in the lower court, was registered under the *Registered Land Act*, Chapter 300 Laws of Kenya (now repealed). Sections 27, 28 and 143 of the *Registered Land Act* provide as follows:

27. Subject to this Act –



- a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
 - b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.
28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –
- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:
- Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.
- 143.
- (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
 - (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.
19. Section 26(1) of the [Land Registration Act](#), 2012 which repealed the *Registered Land Act* provides that:
- The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
20. It is clear from the foregoing provisions of the law that a land title can be nullified on the grounds that the same has been acquired through fraud, mistake, misrepresentation or illegally, unprocedurally or



through a corrupt scheme. The Appellant's case in the lower court was that the 1st and 2nd Respondents had acquired title to the land parcel, Title No. Kisumu/Kochieng/4201, which was a portion of the suit property illegally using forged documents. The Appellant had contended that the subdivision of the suit property which gave rise to Title No. Kisumu/Kochieng/4201 and the registration of Title No. Kisumu/Kochieng/4201 in the names of the 1st and 2nd Respondents took place after the death of Jeremiah Opon Odep (the deceased), who was the registered owner of the suit property. The Appellant's case was that the deceased did not subdivide the suit property and transfer the portion thereof, namely, Title No. Kisumu/Kochieng/4201 to the 1st and 2nd Respondents.

21. At the trial, the Appellant, who acted in person, relied entirely on his witness statement dated 19th August 2021. The Appellant also told the court that he was relying on the documents in his list of documents. From the handwritten notes of the lower court, the court marked the documents as PEX.1, save for the official search for Title No. Kisumu/Kochieng/4201, which was marked as PMFI 1. The Appellant's list of documents included: copies of the registers (Green Cards) for the suit property and Title No. Kisumu/Kochieng/4201, a certificate of official search for Title No. Kisumu/Kochieng/4201, a copy of the Grant of Letters of Administration in respect of the estate of the deceased and a certificate of confirmation of the said Grant. All these documents were filed in court together with the said list of documents. From the evidence that was produced by the Appellant, the Appellant proved that the suit property was at all material times registered in the name of the deceased, Jeremiah Opon Odep, who died on 25th August 2004. The Appellant also proved that he was the legal representative of the estate of the deceased. The Appellant proved further that the suit property was subdivided after the death of the deceased and a portion thereof namely, Title No. Kisumu/Kochieng/4201 registered in the name of the 1st and 2nd Respondents, also after the death of the deceased and before a Grant of Letters of Administration in respect of the estate of the deceased had been issued. Since the suit property was registered in the name of the deceased, only the deceased or his legal representative could subdivide the same and transfer a portion thereof to the 1st and 2nd Respondents. I am of the view that the Appellant, having proved that the suit property was subdivided and a portion thereof transferred to the 1st and 2nd Respondents after the death of the deceased, the Appellant discharged the legal and evidential burden of proof of his case. The burden shifted to the 1st and 2nd Respondents to prove that they acquired the portion of the suit property, Title No. Kisumu/Kochieng/4201 lawfully.
22. In *Kurshed Begum Mirza v Jackson Kaibunga* [2017] eKLR, the court stated as follows:
- “(16)Turning to the second issue; according to section 107 of the Evidence Act, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.”
23. In *Halsbury's Laws of England*, 4th Edition, Volume 17, at paras 13 and 14, the authors have stated as follows on the burden of proof:
- “ 13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a



particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

24. Whereas the legal burden of proof is static, the evidential burden of proof keeps shifting during the trial. The majority of the Supreme Court in Presidential Election Petition No. 1 of 2017, *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR stated as follows on the evidential burden of proof in paragraphs 132 and 133 of the judgment:

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

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

25. The 1st and 2nd Respondents had the burden of proving that although the suit property was subdivided and a portion thereof transferred and registered in the name of the 1st and 2nd Respondents after the death of the deceased, the transaction was lawfully carried out.
26. The 1st and 2nd Respondents produced evidence showing that the deceased, Jeremiah Opon Odep, sold to the 1st Respondent a portion of the suit property measuring 0.25Ha. on 26th November 2000 at a consideration of Kshs. 80,000/-, which the 1st Respondent paid in full to the deceased. The 1st and 2nd Respondents also produced evidence showing that on 27th July 2004, the deceased applied to the Municipal Council of Kisumu for permission to subdivide the suit property into two portions, and the approval was granted on 30th July 2004. The 1st and 2nd Respondents also produced evidence showing that on 11th August 2004, the deceased and the 1st Respondent applied to the Land Control Board(LCB) for consent to subdivide the suit property. There was, however, no evidence that the consent to subdivide the suit property was granted by the LCB and that the deceased signed a mutation form for the formal subdivision of the suit property into two portions. Assuming that the consent was granted and that the deceased executed a mutation form for the subdivision of the suit property leading to the registration of the subdivision on 19th September 2005, there was no evidence that the deceased executed a transfer in favour of the 1st and 2nd Respondents of the portion of the suit property that was sold to the 1st Respondent by the deceased. There was also no evidence that the LCB consent was obtained for such transfer, which purportedly took place on 3rd April 2006, about 2 years after the death of the deceased. There was also no explanation of how the 2nd Respondent, who was not a party to the agreement of sale between the deceased and the 1st Respondent, came to be registered as a co-proprietor of the suit property.



27. I am of the view that the agreement of sale and the application for LCB consent that were produced by the 1st and 2nd Respondents in evidence were not sufficient proof that the suit property was lawfully subdivided and a portion thereof, namely, Title No. Kisumu/Kochieng/4201 lawfully transferred and registered in the names of the 1st and 2nd Respondents. In *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal No. 239 of 2009[2013] eKLR, the court stated that:

“...When a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

28. In the absence of evidence by the 1st and 2nd Respondents that the deceased who had died at the time the suit property was subdivided and the portion thereof, namely, Title No. Kisumu/ Kochieng/4201 transferred and registered in the name of the 1st and 2nd Respondents had executed a mutation form for the subdivision of the suit property and an instrument of transfer of Title No. Kisumu/ Kochieng/4201 in favour of the 1st and 2nd Respondents, and that consent of the LCB had been obtained for the transaction, the 1st and 2nd Respondents failed to prove that they lawfully acquired Title No. Kisumu/ Kochieng/4201 from the deceased. The 1st and 2nd Respondents did not, therefore, have an answer to Appellant’s claim that the 1st and 2nd Respondents acquired the suit property illegally through forged documents. The Appellant had therefore proved his case against the Respondents to the required standard. The learned trial magistrate erred in dismissing the Appellant’s case.

29. Before I conclude the matter, I wish to say that from the evidence on record, I am satisfied that the 1st Respondent lawfully purchased Title No. Kisumu/ Kochieng/4201, which is a portion of the suit property from the deceased and paid the full purchase price. The deceased, however, died before transferring Title No. Kisumu/ Kochieng/4201 to the 1st Respondent and any other person the 1st Respondent would have wished to include in the transfer. The deceased having sold Title No. Kisumu/ Kochieng/4201 to the 1st Respondent and having received the full purchase price, the property did not devolve to the administrators of the estate of the deceased for distribution to the beneficiaries of the estate. This is because the 1st Respondent was the beneficial owner of the property. I will therefore allow the appeal so that the 1st Respondent may restart or commence the process of having the suit property lawfully transferred and/or registered in his name. The Appellant has not persuaded me that he was entitled to general damages. I will therefore not award any damages to the Appellant.

Conclusion

30. In conclusion, I hereby make the following orders;

1. The judgment of the lower court delivered in favour of the 1st and 2nd Respondents against the Appellant on 5th September 2023 and the decree extracted therefrom are set aside and substituted with a judgment in favour of the Appellant against the Respondents in terms of prayers (i) and (ii) of the plaint dated 19th August 2021.
2. The 3rd Defendant shall forthwith cancel the registration of the 1st and 2nd Respondents as the proprietors of all that parcel of land known as Title No. Kisumu/ Kochieng/4201 and the title deed that was issued to them, and shall restore the property to the name of Jeremiah Opon Odep as the proprietor thereof.



3. The 1st and 2nd Respondents shall surrender the title deed held by them in respect of Title No. Kisumu/ Kochieng/4201 to the 3rd Respondent forthwith for cancellation.
4. The Appellant shall have the costs of the appeal, which shall be paid by the 1st and 2nd Respondents. Each party shall bear its costs of the lower court suit.

DELIVERED AND SIGNED AT KISUMU ON THIS 17TH DAY OF JULY 2025

S. OKONG'O

JUDGE

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

Ms. Okaka h/b for Mr. Yogo for the Appellant

Mr. Mwesigwa for the 1st and 2nd Respondents

N/A for the 3rd Respondents

Ms. J. Omondi-Court Assistant

