



**Anusu v Anusu (Environment and Land Appeal E013 of 2023)
[2025] KEELC 1314 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1314 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL E013 OF 2023**

E ASATI, J

MARCH 13, 2025

BETWEEN

EVANS KHASIEVERA ANUSU APPELLANT

AND

DAVID KHASIEVERA ANUSU RESPONDENT

*(Being an appeal from the judgement and decree of Hon. M. Ochieng
PM dated 10th November 2023 in HAMISI MEL CASE NO 11
OF 2022 David Khasievera Anusu vs Evans Khasievera Anusu)*

JUDGMENT

1. Vide the Memorandum of Appeal dated 30th November, 2023, Evans Khasievera Anusu the Appellant herein appealed against the Judgement of Hon. M. Ochieng, Principal Magistrate dated 10th November, 2022 in Hamisi Mel Case No 11 OF 2022 (the suit). The record of appeal reveals that the Appellant had been sued by the Respondent in the suit over a parcel of land known as Kakamega/Serem/1629 (the suit land). Vide the plaint dated 1st October, 2022, the Respondent who claimed to be the registered owner of the suit land claimed that the Appellant by himself, his agents, servants and/or employees forcefully and unlawfully trespassed onto the suit land and erected structures thereon without the Plaintiff's (Respondent's) consent. He therefore sought for an eviction order for the eviction of the Defendant (appellant) from the suit land and a permanent injunction restraining the Defendant (appellant) from ever trespassing and/or laying claim to the suit land. The Respondent also sought for costs of the suit.
2. The record further shows that the Appellant filed a Statement of Defence and Counterclaim dated 25th November, 2022 vide which he denied the Respondent's claim and averred that it was the Respondent who had invaded the suit land in August, 2022 while accompanied with goons and caused damage by cutting down his (appellant's) trees and other crops while claiming that he had acquired title to the land. By way of counterclaim, the Appellant sought for orders that;



- a. the court finds and declares that there is proved existence of customary trust in favour of the Defendant with regard to the registration of title of land parcel No. Kakamega/Serem/1629 in the name of the Plaintiff and that by reason of the said trust, the Defendant is entitled to title over the land parcel.
 - b. an order do issue cancelling the title issued to the Plaintiff (Respondent herein) over the suit land and new title be issued to the Defendant Evans Khasievera Anusuas the registered proprietor and in order to give effect to this transfer, the Court Administrator shall sign all documents on behalf of the Plaintiff if he fails to do so voluntarily.
 - c. costs of or incidental to the suit be paid by the Defendant.
- 3 The proceedings show that the suit was heard before the trial court which vide the judgement dated 10th November, 2023 found that the Respondent had a prima facie case for an order of eviction. The court further found that the Appellant had failed to prove on a balance of probabilities that there exists a customary trust especially after the succession cause in the High Court was heard and determined.
4. The court proceeded to dismiss the counter-claim and enter judgement in favour of the Respondent on the plaint and against the Appellant for an eviction order, an order of permanent injunction and costs of the suit and the counterclaim.

The Appeal

5. Aggrieved by the judgement, the Appellant preferred the present appeal on the ground that;
- a. the learned Magistrate erred in law in not appreciating the fact that by the Appellant's long occupation and use of the suit land parcel, prior to the Respondent's transfer of title to himself, this was amounted to an existing encumbrance recognized in law, sufficient to defeat the Respondent's title.
 - b. The learned Magistrate erred in law and in fact in not arriving at a finding that by the Respondent engaging, to the exclusion of the Appellant, in the sub-division and transfer of the suit portion of land in his name which was already under the occupation and use of the Appellant that in itself was a fraud sufficient to warrant the cancellation of the Respondent's title in favour of the Appellant
 - c. The judgement and decree of the learned Magistrate goes against the overriding objective as provided in section 1A and B of the *Civil Procedure Act* which is binding on all courts of law in the administration of justice.
 - d. The learned Magistrate erred in law in failing to consider the principles of the law that a party who is seeking equitable remedy of injunction before a court of law must display clean hands beyond reproach and candid which attributes the Respondent was explicitly lacking.
 - e. The learned Magistrate did not address herself to the current principles applicable to counterclaims of which, if she was properly guided, she would have found for the Appellant on the counterclaim and entered judgement in his favour accordingly.
 - f. The judgement and decree of the trial Magistrate is against the weight of the evidence which was presented before her.
 - g. The judgement and decree of the learned Magistrate is against the spirit of article 40 of *the Constitution* on the protection of private property.



- h. In all aspects of the case, the learned Magistrate did not apply the current principals of law to the case before her and in particular the law of trust as a result of which the Appellant has suffered gross injustice.
6. The Appellant sought for orders that the appeal be allowed, the decree and all orders of the subordinate court arising therefrom be set aside, that the Respondent's suit presented to the subordinate court be dismissed, that the Appellant's counterclaim be allowed in terms that the Respondent's title to the suit registered as Kakamega/Serem/1629 be cancelled and be substituted thereof by the name of the Appellant as the registered proprietor and fresh title be issued in his name and that the costs of the appeal and of the subordinate court be met by the Respondent.

Submissions

7. Pursuant to directions given on 19th September, 2024, the appeal was disposed of by way of written submissions.

Submissions for the Appellant

8. Written submissions dated 13th January, 2025 filed by the firm of A.B.L. Musiega & Co. Advocates were filed on behalf of the appellant. In respect of ground 1 of the appeal Counsel referred the court to the case of James Obande Wasui -vs- Jeremiah Ochwada Musumba (2002)eKLR where the court held that if the Applicant had been in adverse possession of the land for 12 years prior to sub-division, the proprietors of new titles would not be able to shake off his rights.
9. In respect of ground 2 of the appeal, Counsel submitted that the court should not give a blind eye to the background circumstances under which the Respondent came to hold the title. Counsel referred the court to Civil Appeal No.465 of 2019 Wambui -vs- Mwangi & 3 Others (Civil Appeal 465 of 2019) [2021]LECA 144 (KLR) 19 November 2021 (Judgement) where the court observed that no court of law should sanction and pass as valid any title to property founded on fraud, deceitfulness, a contrived decree, illegality, nullity, irregularity, un-procedurality or otherwise, a product of a corrupt scheme. Counsel submitted that the Respondent's conduct leading to acquisition of the title from which he seeks to dislocate the Appellant fails the test and should not be tolerated by the court.
10. In respect of ground 3 of the appeal, Counsel invited the court to determine whether it is just to allow the Respondent to displace the Appellant's family from the land.
11. On ground 4 of the appeal, Counsel submitted that even though the lower court appears to have arrived at the conclusion that the Respondent's title to the suit land was sanctioned by the High Court in the Succession Cause, that conclusion was mistaken. That the High Court did not go to the site to apportion the land to the Respondent. Counsel relied on the case of Lucy Njeri Macharia -vs- Frashian Wambui Njeri & Another [2017]eKLR to support the submissions.
12. In respect of ground 5 of the appeal, Counsel submitted that the only reason advanced by the learned Magistrate for dismissing the Appellant's defence and counterclaim was that the Succession court had given the Respondent the suit land and that therefore the defence and counterclaim was unmerited. Counsel submitted that the court did not comprehend the Appellant's case. That the facts of the case pointed to a trust.
13. In respect of ground 6 of the appeal, Counsel submitted that the evidence before the court was that the Respondent had never resided on the suit land parcel as it was the Appellant who was living there with his family all their lifetime.



14. In respect of ground 7 of the appeal, Counsel submitted that the trial Magistrate erred in her judgement to deprive the Appellant of his property.
15. And for ground 8 of the appeal, Counsel referred the court to the case of Cosmas Cheronno & 2 Others -vs- Veronica Cheronno [2021]eKLR on the elements of a customary trust.

Submissions for the Respondent

16. On behalf of the Respondent, written submissions dated 31st January, 2025 were filed by the firm of Nandwa & Company Advocates. Counsel submitted that the issues for this courts consideration in the appeal are: -
 - a. whether or not this court can overturn the decision of the High Court,
 - a. whether or not the Appellant has provided sufficient grounds for impeachment of the Respondent's title,
 - b. whether or not the appellant pleaded and proved adverse possession and trust.
17. Counsel submitted that interference with the ownership of the suit land shall be tantamount to the court sitting on appeal over a decision of the High Court. That the Appellant had filed objection in the succession cause and the court made a ruling confirming the distribution of the estate.
18. That the Appellant's claim intends to have the Respondent's title impeached. Relying on the provisions of section 26 of the *Land Registration Act*, Counsel submitted that the court has to interrogate the manner through which the Respondent obtained title. Counsel submitted that since the title was obtained through a succession process in which the Appellant was represented, the grounds in section 26 of the *Land Registration Act* for impeachment of title had not been met.
19. That the Appellant did not plead adverse possession or trust in the lower court. That these are new, unlitigated issues that cannot be determined in the appeal.
20. Counsel relied on the case of Juletabi African Adventure Limited & Another -vs- Christopher Michael Lockey [2017]eKLR where it was held that the onus lies on a party relying on the existence of a trust to prove it through evidence. It was submitted that the Appellant never led any evidence in support of trust. That the Appellant was a beneficiary of the estate who also got his portion of the land out of the mother ancestral land. That the Appellant has wrongly invoked the jurisdiction of this court as the dispute arose in a succession cause and that the Appellant did not appeal against the ruling in the succession cause.

Counsel urged the court to uphold the decision of the trial court.

Analysis and Determination

21. This being a first appeal, this court is under a duty to reconsider and analyze the evidence adduced before the trial court and arrive at its own independent conclusion. In the case of Selle and another vs Associated Motor Boat Company Ltd and others 1968 E.A 123 it was held that:

“An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has never seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not- necessarily bound to follow the trial court's findings of fact if it appears either that he clearly failed on some point to take



account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

Eight grounds of appeal were presented in the Memorandum of Appeal.

22. The first ground of appeal is whether or not the fact that by the Appellant’s long stay, occupation and use of the suit land parcel prior to the Respondent’s transfer of title to himself amounted to an existing encumbrance recognized in law sufficient to defeat the Respondent’s title.
23. The long occupation of land which is recognized in law and which is capable of defeating the title of a registered owner is occupation that amounts to adverse possession under section 7, 13, 17 and 38 of the Limitation of Action Act. In the instant case however, there was no claim for title to the land by adverse possession in the counterclaim or at all. Further, even if there was a claim based on adverse possession, the trial court had no jurisdiction to handle it. The trial court did not therefore err.
24. The second ground of appeal faults the trial court for failing to find that the Respondent obtained the title fraudulently.
25. I have considered the pleadings, evidence and the submissions. Although the Appellant claimed that the Respondent obtained title by fraud, fraud was not pleaded or proved. The law requires that the particulars of fraud be pleaded. The law also requires that fraud be proved to the required standard of proof for claims based on fraud. In *Koinange & 13 others vs Charles Karuga Koinange* 1986 KLR at page 23 the court held that:

“When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”
26. This was not done by the Appellant. The Respondent on the other hand pleaded and testified that he got title to the suit land through a succession process in the High Court in which the appellant participated. I find that ground 2 of appeal has not been proved.
27. The third ground of appeal is that the judgement was against the overriding objective as provided in sections 1A & B of the *Civil Procedure Act*. It was however not demonstrated through submission or at all how the judgement breached the overriding objective.
28. The 4th ground of appeal was that the Respondent did not come to court with clean hands. This ground was also not explained or demonstrated. Similarly, in respect of ground 5 of appeal, it was not disclosed which correct principles applicable to counterclaims the trial court failed to adhere to.
29. Ground 6 of the appeal is that the judgement was against the weight of the evidence.
30. The evidence placed before the trial court by the Appellant comprised of his own testimony. He testified as DW1 and adopted the contents of his witness statement dated 25th November, 2022 as his evidence in chief. He had stated in the witness statement that the Respondent was his biological brother. That their late father was the registered owner of the suit land. That he built his house on the suit land in the year 1995 when he married and that he has lived on the suit land with his wife and 8 children since then. That the Respondent used succession proceedings to survey their late father’s estate comprised of the parcel of land known as Kakamega/Serem/762 and created the title in respect of the suit land.



31. That the Respondent had never accepted him as his biological brother as the Respondent accused their mother of committing adultery as a result of which the Appellant was born and that the Respondent had vowed to dislocate him from the land.
32. That he had no idea how the land was sub-divided but that it was all fraudulent so that the Respondent could get the portion the Appellant was occupying. That he had been occupying and farming on the land since he was born. That the Respondent only invaded the land in the month of August, 2022, cut down trees and crops and carried them away and that the loss occasioned to him was worth Kshs.2.8 million.
33. In cross-examination, the Appellant stated that it is land parcel No.762 that he wanted where he lived.
34. The exhibits produced, particularly by the Appellant, show that vide court order in KAKAMEGA HIGH COURT SUCCESSION CAUSE NO.696 OF 2009 dated 11th December, 2019 land parcel NO. TIRIKI/SEREM/762 was to be partitioned into five (5) portions as per amended Certificate of Confirmation dated 31st October, 2018. That the Land Registrar, Vihiga was ordered to effect transmission of the five (5) respective portions in respective names of the all beneficiaries.
35. A letter also produced by the Appellant and dated 22nd June, 2021 from the County Land Surveyor listed the concerned parties in the distribution of the said parcel of land and the Appellant's names was one of them.
36. The Appellant also stated on cross-examination that the court made an order that each party gets 0.32Ha of the land and that he did not agree with the distribution. He further stated that he knows that the land was divided into 5 parcels but that he did not know his title number. He stated further that he made an application to the High Court that he should not be dislocated from where he stays, but that the application was struck out.
37. It is clear that the Appellant was a beneficiary in the succession cause. It is therefore not true that he was excluded. It is also clear that the suit land is the portion allocated to the Respondent as a result of the distribution. If the appellant was not satisfied with the distribution done by the High Court, the appropriate forum for redress could be in an appellate court or in the same court by way of application for review.
38. I find that no evidence was placed before the trial court in support of the counterclaim.
39. As regards the claim based on trust, taking into account the circumstances of the case, I find that the doctrine of customary trust did not arise. The suit land is a product of distribution of an estate of a deceased person through a succession cause from which both parties benefited and there is no evidence that the suit land was registered in the name of the Respondent in trust for the Appellant.
40. The upshot is that I find that the appeal has no merit and hereby dismiss it.
41. As the parties are brothers, each party to bear own costs of the appeal.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 13TH DAY OF MARCH 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:



Ajevi: Court Assistant.

Malanda for the Appellant

No appearance for the Respondent.

