



REPUBLIC OF KENYA



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**Gobe v Bora (Environment and Land Appeal E005 of 2023)
[2025] KEELC 3267 (KLR) (7 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3267 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISILOLO
ENVIRONMENT AND LAND APPEAL E005 OF 2023**

JO MBOYA, J

APRIL 7, 2025

BETWEEN

ALI GOBE APPELLANT

AND

MOHAMED GOLICHA BORA RESPONDENT

*(Being an appeal of the judgment and decree of the Honourable M.S.Kimani
(.P.M) delivered on 3rd March 2023 in Moyale PMC ELC NO. E014 OF 2021)*

JUDGMENT

Introduction and Background

1. The Respondent herein vide a Complaint dated 25th October 2021, lodged a suit against the Appellant in respect of an unregistered parcel of land [Plot] known as Plot Number 1132 HEILU [hereinafter referred to as the suit property].
2. For clarity, it was the Respondent's case in the trial court that sometimes in the year 2006 same was granted the suit property upon lodging an application to be allocated with the suit property by the area elders which property was situated at Moyale Girls area. Subsequent to the said allocation, the Respondent sold the suit property to one Dawa Sole Dime [hereinafter referred to as the Purchaser] and that the suit property was then after registered in the name of the purchaser.
3. It was contended by the Respondent that the County Government of Marsabit registered the Purchaser as the owner of the suit property. However, the appellant started laying claim on the suit property alleging that same had been bequeathed the suit property by his stepfather one SOSO DULA, now deceased and that upon a complaint being lodged with the Town Administrator, the ownership of the suit property was deregistered and the appellant declared as the owner. The respondent sought inter alia a declaration that the respondent was the sole owner of the suit property which was now registered in the name of the purchaser.



4. Upon being served with the plaint, the appellant herein lodged an undated statement of defence contending that the suit property was gifted to him by his stepfather one SOSO DULA, now deceased. His case was that upon discovering that the respondent had acquired the suit property irregularly, same lodged a complaint with the Town Administrator who in turn convened various meetings between the parties herein for the purposes of finding an amicable solution to the land dispute. The Appellant asserted that the Town Administrator found that the suit property was not allocated to the respondent neither could the elders allocate land to the respondent. He prayed that the suit by the respondent be dismissed with costs.
5. The appeal herein was admitted and it was ordered on the 29th April 2024 that the appeal be canvassed vide written submissions. On the 18th February 2025, parties herein attended court and confirmed that same had lodged in court their respective submissions; however as at the time of crafting the judgment, I only had the benefit of perusing the submissions lodged by the appellant.

Parties' Submissions:

a. Appellant's submissions:

6. The Appellant filed written submissions dated the 16th June 2024, and in respect of which same [Appellant] has argued the grounds of appeal by synchronising the grounds therein into three issues. In this regard, the court shall proceed to highlight the submissions on behalf of the Appellant.
7. Firstly, the appellant submitted that village elders have no mandate to allocate and/or alienate community land held in trust by the defunct Moyale County Council on behalf of the community. The appellant relied on Section 6 (1) of the Community Land Act No. 27 of 2016 whereby same was to the effect that the County Government holds in trust all unregistered community land on behalf of communities. The appellant further highlighted the provisions of Section 6 (1) of the same Act that barred the County Government from selling, disposing, transferring, converting for private purposes any unregistered community land that it is holding in trust on behalf of communities for which it is held.
8. It was the appellant's submissions that the suit property belonged to his step father SOSO DULA, now deceased, and that the deceased had made a gift inter vivos in his favour in 1997 and was surprised that a third party, namely, the Purchaser was claiming interest on the suit property courtesy of a transaction entered into between the purchaser and the respondent herein.
9. The appellant submitted that village elders lacked the mandate to alienate and/or allocate unregistered land to an individual. He faulted the procedure upon which the respondent had allegedly acquired the suit property and maintained that the respondent had not proved his case pursuant to Sections 109 and 112 of the Evidence Act.
10. Secondly, the appellant submitted that a gift inter vivos was made to the appellant by the deceased. He relied on Section 2 (3) of the Law of Succession Act with regard to application of the Act where the deceased subscribed to Islam. The appellant relied on the case of *Habiba Sharu Hirbo V Ibrahim Sharu Hirbo & Another* [2020] eKLR that discussed the meaning of a gift in Sharia law.
11. It was the appellant's submission that the trial court erred when same held that there was no evidence proving that the deceased had made gift inter vivos in favour of the appellant. According to the appellant, the evidence of DW6 one Halima Sora Ikke, also the wife of the deceased, was sufficient prove that the deceased had gifted the appellant with the suit property. The appellant relied on the authority of *Micheni Aphaxard Nyaga & 2 Others V Robert Njue & 2 Others* [2021] eKLR.



12. Finally, the appellant submitted that same had demonstrated how he acquired the suit property and that the evidence adduced before the trial court was sufficient. On the other hand, same faulted the respondent for failing to demonstrate how he came to own the suit property. The appellant made reference to the case of Raphael Wangui & 2 Others Vs Josephine Wangui & Another.
13. Arising from the foregoing, learned counsel for the Appellant has therefore contended that the judgment by the learned trial magistrate is therefore erroneous and thus ought to be set aside. Furthermore, learned counsel for the Appellant has implored the court to proceed and allow the appeal.

Jurisdictional Posture:

14. The appeal beforehand is a first appeal from the decision of the court of first instance. By virtue of being a first appeal, this honourable court is vested with the requisite jurisdiction to review, re-evaluate and re-analyse the findings of the court of first instance and thereafter to arrive at independent conclusions, taking into account the evidence on record and the applicable laws.
15. Nevertheless, it is imperative to underscore that even though this court is clothed with jurisdiction to review, re-evaluate and re-analyse the findings and observations of the trial court, this court is, however called upon to exercise necessary caution and circumspection. In addition, the court is called upon to defer to the findings of the trial court unless the findings of the trial court are informed by extraneous factors or better still, are perverse to the evidence on record.
16. The scope and jurisdictional remit of this court whilst entertaining a first appeal has been elaborated upon and underscored in various decisions. In the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, the Court of Appeal for Eastern Africa [EACA] highlighted the principle thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of 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 neither seen nor heard the witnesses and should make due allowance in this respect...”
17. Likewise, the extent and scope of the Jurisdiction of the first appellate court was also elaborated upon in the case of *Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where the court held thus;

We also wish to be guided by the reasoning of this court in the case of *Mwana Sokoni versus Kenya Business Limited* (1985) KLR 931 page 934,934 thus:-

“Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the House of Lords in *Sottos Shipping versus Sauviet Sohld*, the Times, March 16,1983.

“It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal



to assess the significance of what was said, how it was said, and equally impotent what was not said”

Again, in *Peters versus Sunday Post Limited* (1958) EA424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O’ Conner, P said at page 429:

“It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses”

18. Guided by the ratio decidendi in the decisions [supra], this court is now well positioned to interrogate the judgement rendered by the Principal Magistrate and to discern whether the magistrate took into account the relevant facts and the law or otherwise.

Issues for Determination:

19. Having reviewed the pleadings filed; the contents of the Memorandum of appeal dated 16th March 2023 and having taken into account the proceedings of the trial court and finally upon consideration of the written submissions filed by the appellant, the following issues do crystalize [emerge] and are thus worthy of determination;
- i. Whether the respondent proved that the suit property belonged to him and/or he had any beneficial interest over and in respect of the same?
 - ii. Whether the appellant herein established that the suit property belonged to him vide gift inter vivos being made by his deceased father?

Analysis and Determination:

Issue Number 1

Whether the respondent proved that the suit property belonged to him and/or he had any beneficial interest over and in respect of the same?

20. It is apposite to refer to the provisions of Articles 62, 63 and 64 of *the Constitution*, 2010; which prescribes for public, community and private land in Kenya. Any citizen of Kenya can hence own land vide the three avenues as stipulated in *the Constitution*. In the instant case, counsel for the Appellant has submitted that the suit property was a community land. For clarity, I do not agree with that submission; however I will classify the suit property as a public land pursuant to Article 62 (2) of *the Constitution*. For coherence, same states,

‘...Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission if it is classified under—(a) clause (1) (a), (c), (d) or (e)...’

Article 62 (1) Public land is—

- (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;
- (c) land transferred to the State by way of sale, reversion or surrender;
- (d) land in respect of which no individual or community ownership can be established by any legal process;



- (e) land in respect of which no heir can be identified by any legal process;
21. The suit property is thus a public land as prescribed by *the Constitution* and was being held in trust for the residents of County Government of Marsabit hence any person desirous to be registered as the owner of the such a land must apply for approval from the concerned County Government. In the foregoing, the submissions by counsel of the Appellant that the suit property is community land is thus erroneous. Having stated that, it is thus necessary to address the issue herein.
 22. The respondent relied on three documents to prove that the suit property belonged to him namely illegible letter from the chief, illegible application form for registration of an unregistered plot/market and trading center and unsigned Will dated 18th November 2013. I wish to point out that the suit property is unregistered hence it was incumbent upon the respondent to prove the history and/or ownership of the suit property through documentary evidence.
 23. Besides, the respondent testified that same had applied for allocation of land from area elders and that in 2006, same was allocated the suit property vide the letter from the chief. PW3 and PW4 testified that they were members of land committee in Heilu location and that same had allocated the respondent a parcel of land measuring 280 feet by 264 feet. Interestingly, the allocation therein is being reduced into writing vide an area chief's letterhead which allocation was reduced in writing by the area chief, also PW2.
 24. It was not demonstrated by the respondent as to who PW3 and PW4 are by way of a formal letter or some sort of identification. There was no letter produced by the respondent as to his application to be allocated land by the so-called area elders even assuming that PW3 and PW4 had the mandate to allocate and/or alienate land. Clearly, no evidence was adduced by the respondent from the Ministry of Land or even the County Government of Marsabit to identify who PW3 and PW4 were.
 25. What is more baffling is that P EXH 2 being the illegible application form for registration of unregistered plot/market and trading center, was referring to a parcel of land measuring 100 feet by 100 feet as opposed to 280 feet by 264 feet which was allegedly alienated to the respondent by PW3 and PW4. There were no minutes pertaining to the alienation and/or allocation of the suit property to the Respondent. P EXH 2 was undated, incomplete and unstamped. Its origin cannot be ascertained.
 26. In *Mohamed v Duba & another* [2022] KECA 442 (KLR), the appellate court when dealing with an unregistered suit property which was the subject of the dispute held that,

'...A determination of the respective parties' entitlement to the suit properties can only be made on the basis of an analysis of the various indentures produced by the parties and their evidence as regards the circumstances of their procurement, and their legal effect. Our analysis has been guided by the principles that apply to evidence of title in respect of unregistered land as provided in the text by Kevin Gray and Susan Francis Gray on *Elements of Land Law*, 5th Edition at page 185 as follows: "Evidence of title to an unregistered estate in land usually exists only in the form of a chain of documentary records (or title deeds) which detail successive transactions with that land over the course of time. These historic documents of title (or 'deeds bundles') are privately controlled, being retained normally within the custody of the proprietor of the estate to which they relate. These deeds provide the "essential indicia of title" since the information contained in them, when coupled with the fact of undisturbed possession, generally identifies the person who currently has the best 'title' to any relevant estate in the land. Title to an estate can also be claimed, however, by



one who holds no supporting documentary evidence but relies instead on the sheer fact of his own possession.”

27. I further beg to place reliance in the case of *Danson Kimani Gacina & another v Embakasi Ranching Company Ltd* [2014] eKLR. J.L. Onguto, J held that:

“The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities but the court must be left in no doubt that the holder of the documents proved that he is the one entitled to the property.

The Plaintiffs claim ownership of plots known as D355, D356, D355B, D356B, E12, E13, E12B and E13B on LR No. 10904/2. A total of eight plots. The plots were allocated to them for a consideration paid to the Defendant. PW1, like PW2, in an endeavor to prove ownership to the plots produced receipts, share certificates and beacon certificates.

Even though PW1 had testified that he purchased and paid for two plots in 1976, he did not produce any evidence to show such payment in 1976. The only receipt availed for payment in 1976 was for the amount of Kshs. 2,200/= . It was not for 7,000/= and there was no other receipt. That receipt which was marked as PEx-2 was dated 13th November, 1976. It was receipt No. 10292 issued by M/s Gatuguta & Manek. It was not issued by the Defendant.

That receipt also had the glaring inscription on its face horizontally reading “CANCELLED”. In my view, this remark took away the probative value of the receipt. Even then it was not proof that the 1st Plaintiff had paid the Defendant any money in 1976.”

28. Finally in *Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & 2 others* [2015] eKLR, in determining the issue of ownership of the plot stated as follows: -

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.....

It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’’: per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.

The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.”



29. The respondent at the trial court only produced three documents to prove that same was the owner of the suit property. Among the documents produced in court, none of them had any probative value to establish ownership in favor of the respondent. PW2, the area chief admitted that he was the one who crafted and/or generated the acceptance letter. It was not within his mandate to allocate land to the respondent. None of the witnesses called by the respondent proved that the respondent was the owner of the suit property. Even the alleged purchaser was never called in court as a witness to corroborate the evidence on the purchase. There were basically no documents pertaining to the history of the suit property in so far as the respondent's claim was concerned. The respondent did not produce even a receipt pertaining to payment of rates and/or outgoings or allotment letters.
30. On the other hand, the appellant similarly produced an application form for registration of unregistered plots in urban market and trading center. The land in question measured 100 feet by 70 feet. In the said document, one Mutano Liban also DW3, Dale Amba also DW4 and Hassan Abdi also DW5, were the same persons listed in the said application form as neighbors and/or people who knew the appellant and the history of the land. Looking at the respondent's document of the same kind, the segment therein was left blank, the connotation being that he was a stranger in the said area where the suit property was situated.
31. Besides, the appellant produced a bundle of receipts in respect of payment of rates and/or outgoings to the County Government of Marsabit. The respondent did not controvert the said documents. Finally, the dispute concerning the suit property was escalated to the Department of Energy, Lands and Urban Development by the appellant and it can be discerned that the parties herein and some of the witnesses called during trial attended and participated in the proceedings.
32. To that extent, I have had the benefit of perusing the minutes of 14th February 2020 and the verdict vide letter dated 31st August 2021 which found the appellant's father to be the owner of the suit property and later the appellant became the owner of the suit property and not the respondent. The committee hearing the dispute therein also noted that the alleged elders and/or land committee that allocated land did not have the mandate to do so as that was within the mandate of the County government.
33. Clearly, clan elders, area alders or land committees cannot purport to allocate and/or allocate a public property as this mandate has not been provided anywhere in law. The alleged application for approval by the respondent was desultory. It appeared to have been done in a hurry to meet the cunning plan of the respondent to rob another party his rightful earthly possession. Besides, the Will dated 18th November 2013 produced by the respondent had no probative value. For clarity, the said Will did not comply with the provisions of Section 11 of the *Law of Succession Act*. The testator did not sign and/or execute the will neither was the Will attested by competent witnesses.
34. The respondent never sought an order quashing the decision by the set-up committee to adjudicate over the dispute hence the administrative action by the said committee stood unchallenged. On the other hand, it is instructive to note that there was no administrator of SOSO DULA, now deceased; who challenged the claim by the appellant as the owner of the registered land.
35. In fact, DW6, also the wife to the deceased confirmed that the deceased had gifted the appellant with the land as one of his children that same had been in possession of the suit property, the connotation being that the family of the deceased were aware that the suit property had been bequeathed to the appellant who had made an attempt to register the same.
36. From the foregoing analysis, it is my considered view that the trial court erred in fact and law when same upheld the suit by the respondent. It was a serious error to declare the respondent the owner of the suit property based on an illegitimate allocation. For clarity, in addressing the standard of proof in



civil cases, the appellate court in the case of *James Muniu Mucheru V National Bank of Kenya Limited* [2019] eKLR, held that,

‘...indeed it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the courts will make a finding based on which party’s version of the story is more believable...’

37. On the other hand, Section 107 of the *Evidence Act* places the burden of proving the alleged by the person alleging. Having reconsidered the evidence adduced by parties in the trial court, it is my finding that the burden was not discharged by the respondent herein. If same acquired the suit property, then it was by way of illegal and/or unprocedural means hence same cannot be declared to be the rightful owner.

Issue Number Two

Whether the appellant herein established that the suit property belonged to him vide gift inter vivos being made by his deceased father?

38. Having looked at the statement of defense lodged by the appellant, it suffice[s] to note that same did not lodge a counterclaim seeking an order of declaration that same is the rightful owner of the suit property despite placing before the trial court evidence pertaining to the documentary history of the suit property.
39. The verdict by the Committee from County Government of Marsabit was to the effect that the appellant was the owner of the suit property by virtue of being gifted the suit property by his late father. Indeed, the appellant’s case was that the deceased had made gift inter vivos with respect to the suit property before he passed on and the witnesses called confirmed as much, especially DW6 who was the appellant’s stepmother. Counsel for the Appellant submitted that the requirement that gift inter vivos be in writing does not apply to the instant case as the deceased was a Muslim. For clarity, it was not ascertained that the deceased was a Muslim neither can it be assumed that he was subscribing to the said religion and/or faith.
40. Be that as it may, the issue of religion was in issue however it is to be noted that Section 2 (3) of the *Law of Succession Act* only applies to testamentary and intestate succession with regards to distribution of the estate of the deceased under either of those circumstances hence the argument by the appellant does not stand.
41. The appellant alleged that his step father had gifted him with the suit property in 1997 before he died. However, I have perused the record of appeal and I am unable to discern any document that established that the deceased divested himself of the suit property. Though DW6 corroborated the evidence of the appellant that the suit property was a gift to the appellant, there was no document placed before the trial court to establish that the deceased had done everything possible to transfer the suit property to the appellant.
42. In *Ogware v Mangera & 4 others* ([2021] KECA 117 (KLR), the Court of Appeal held that,
- ‘.....the gift of portions of land to the 3rd respondent was completed before the deceased died regardless of the fact that the transfer itself had not been registered at the land’s office...’ It was further held that, ‘...our conclusion is that the deceased gifted the 3rd respondent the suit land before his death having executed all the documents necessary on his part to effect the transfer...’



43. Similarly, in *Re Estate Of Chesimbili Sindani (Deceased)* [2021] eKLR, Musyoka J Held that,

‘...Firstly, no documents were presented to support that contention... Anyhow, what the protestor is saying is that there had been what is called an inter vivos distribution of the property, through gifting that the deceased made prior to his death.

‘...any gift inter vivos should be backed by some memorandum in writing, and the gift would be complete once title to the subject property is transferred to the name of the beneficiary of the gift. Difficulties arise where transfer is not effected to the beneficiaries before the death of the deceased, in which case such property would remain the free property of the deceased, available for distribution at confirmation, the argument being that such gift was founded on a mere promise which the deceased did not carry through prior to his death.

Where some preliminary steps were taken towards effectuating his promise, so that all what remained after the death of the deceased was mere registration of the property in the name of the beneficiary, it would be presumed that that the deceased intended to make a gift inter vivos. That would be the case where the deceased has complied with the *Land Control Act*, Cap 302, Laws of Kenya, where the land is subject to that law, by applying for consent to transfer the property from the name of the deceased to that of the beneficiary, the consent had been granted, and he had signed a transfer form to facilitate registration of the property in the name of the beneficiary.

‘...There is no evidence that there was any complete lifetime gift of the lands to the children, nor of documents that show that the deceased had done everything that needed to be done to perfect or complete the gifts by way their registration in the names of the deceased. Clearly, the sons have no provided any evidence of gifts inter vivos...’

44. The appellant only asserted that the deceased had made gift inter vivos before he died. Further that he had distributed is properties to his children. However, I have had a chance to look at the record, no document was placed before the trial court to prove that the deceased had divested himself of the suit property.

45. It is however, important to note that, there was no administrator of the deceased that challenged the ownership of the appellant with respect to the suit property. On the contrary, even the widow of the deceased confirmed that the deceased had gifted the appellant with the suit property. I also note that the County Government of Marsabit confirmed that the appellant was the rightful owner of the suit property same having gotten same from his deceased stepfather.

46. On the other hand, the alleged Purchaser did not apply to be joined in the proceedings before the trial court to claim ownership of the suit property. Finally, I have also found that the suit property was illegitimately allocated and/or alienated to the respondent by strangers who had no legal mandate to allocate land.

47. The appellant has sought for prayers at the foot of the memorandum of appeal dated 16th March 2023 that the I make an order that the suit in the trial court to commence de novo. For clarity, no evidence has been placed before the court to prove that the trial court was biased and/or committed an injustice to warrant such an order being granted. Besides, counsel for the appellant did not also submit on this issue.



Final Disposition:

48. Flowing from the discussion [details contained in the body of the judgment], it must have become crystal clear that the Respondent [if at all] same acquired the suit property, the process was marred by irregularities and illegalities, hence same has no claim and/or rights over the same.
49. In the premises, the final orders that commend themselves to this court are as hereunder;
- i. The Appeal herein is successful and same be and is hereby allowed.
 - ii. Consequently, the Judgment of the learned magistrate rendered on the 3rd March 2023 be and is hereby set aside.
 - iii. The prayer seeking that the suit before the trial court to commence de novo is hereby declined.
 - iv. The Respondent's suit in the Lower Court be and is hereby Dismissed.
 - v. The Appellant be and is hereby awarded cost of the appeal; and costs of the suit vide Moyale PMC ELC No. E014 of 2021.
 - vi. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 7TH DAY OF APRIL 2025.

OGUTTU MBOYA

JUDGE.

In the presence of

Mukami/Mustafa Court Assistant.

Miss Abuga holding brief for Mr. Owade for the Respondent.

N/A for the Appellants [though duly informed of the Date]

