**Achochi v Bonuke & another (Environment and Land Appeal E002 of 2024) [2025] KEELC 3150 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3150 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ENVIRONMENT AND LAND APPEAL E002 OF 2024**

**M SILA, J**

**APRIL 3, 2025**

**BETWEEN**

**JASON ACHOCHI ..... APPELLANT**

**AND**

**WILFRED NYAMWANGE BONUKE ..... 1ST RESPONDENT**

**JAMES BONUKE GESICHO ..... 2ND RESPONDENT**

***(Being an appeal against the judgment of Hon. P.K Mutai, Principal Magistrate, delivered on 18 December 2023 in the suit Kisii CMCCELC NO. 113 OF 2020)***

## JUDGMENT

1. The suit before the lower court was commenced through a plaint filed on 8 December 2020 by the 1st respondent solely against the appellant. The 1st respondent pleaded to be the registered proprietor of the land parcel Nyaribari Chache/Nyanturago/2151 (the suit land or parcel No. 2151). He pleaded that in March 2019 the appellant forcefully entered the suit land and started working on it without his authority. It was pleaded that he erected temporary structures and grew crops to the detriment of the plaintiff. It was pleaded that the appellant blocked and chased away a person who had leased the land from the 1st respondent. In the plaint, the 1st respondent asked for the following orders :

    a. Damages for trespass;

    b. Mesne profits for illegal use and occupation of the suit land;

    c. Eviction of the appellant;

    d. A permanent injunction to restrain the appellant from the suit land;

    e. Interest on (a) and (b) above;

f. Costs of the suit.

2. The appellant filed defence which he later amended and introduced a counterclaim. He pleaded that the title deed that the 1st respondent held was null and void and fraudulently obtained; the particulars of fraud being, that it was subdivided from the land parcel Nyaribari Chache/Nyanturago/783 (parcel No. 783) without the mandatory Land Control Board (LCB) consent, that title was obtained while he was in occupation, that transfer was effected without LCB consent, that stamp duty was not paid. He claimed that the suit land is the portion designated for his mother by his father (the original proprietor of the land parcel No. 783) and that the transfer to the 1st respondent was an attempt to disinherit him of his ancestral land. In the counterclaim, he sued the 1st respondent and introduced the 2nd respondent as 2nd defendant in the counterclaim. He pleaded that prior to the subdivision, the 2nd respondent had designated distinct portions of the suit land to his two wives. He pleaded that the 2nd respondent subdivided the land and transferred the whole of it to his step-brothers rendering him destitute and landless. He claimed that transfer was effected while he was in possession. In the counterclaim he asked for the following orders :

   a. A declaration that the subdivision of the land parcel No. 783 to create the parcels No. 2150 and 2151 is null and void ab initio.

   b. An order of cancellation of the registration of the suit land in favour of the 1st respondent to himself.

   c. Costs of the suit.

3. Hearing commenced on 22 August 2022 when the 1st respondent (as plaintiff) testified. He largely relied on a pre-recorded witness statement which was fairly brief. In it he stated that he is the registered proprietor of the suit land; that around March 2019 the appellant being a stranger to him, wrongfully entered his land and erected a temporary structure and chased one Kennedy Onuong'a who had leased the suit land for 5 years. He stated that he tried talking to him to vacate peacefully but was repulsed violently with a panga and the appellant threatened to slice him into pieces and feed him to the dogs. He stated that he reported the matter at Keumbu Police Station and the appellant was arrested but later released.

4. Cross-examined, he testified that this was ancestral land that he inherited from his father, the 2nd respondent. He was born in 1969. He has a brother by name of Jason Onkoba Bonuke and sisters as well. He testified that they obtained consent. He elaborated that he was given the land by his father in 2012 but transfer was done in 2020. He leased the land to Mr. Onuong'a in 2017 before he got title. He stated that it was in 2019 that the appellant came to the land and built a temporary house. He asserted that he does not know the appellant and did not know whether he was his step-brother. He testified that he has been staying in Nairobi and he was alerted about the appellant's invasion of the land.

5. PW – 2 was the 2nd respondent. He adopted a witness statement in which he testified that he was the sole registered proprietor of the land parcel No. 783. He stated that he freely decided to gift the said land to his two sons, the 1st respondent and Jason Onkoba. He thus initiated the process of subdivision and transfer. The land was thus subdivided into the parcels No. 2150 and 2151. He transferred the parcel No. 2150 to Jason Onkoba and the parcel No. 2151 to the 1st respondent. He stated that he complied with all necessary legal requirements in terms of consents and taxes. He stated that he lives with his wife, Rhoda Bonuke, in the land parcel No. 2150. He stated that in July 2019, the appellant came to the parcel No. 2151 claiming that he has an interest in it. He reported the matter to Keumbu Police Station and a process of arrest was commenced. While the matter was under investigation the appellant erected semi-permanent structures. He stated that at this time the 1st respondent was away

in Nairobi, where he resides and works, and had leased the suit land to Mr. Onuong'a for five years from 2 January 2017.

6. Cross-examined, he testified that he does not know the appellant. He stated that he does not also know one Margaret Moraa (who was claimed to be the mother of the appellant). He denied that she was ever his wife. According to him he has no relation whatsoever with the appellant. He testified that the appellant ambushed him on his land with motorcycle riders. He denied having a case with him before the Chief. He stated that he obtained consent in 2012 but the process of transfer delayed for lack of funds. He identified the 1st respondent as his first born son. He has six daughters and he stated that he has not given them land. He asserted that he cannot give the appellant any land for he is not his son. He contended that if he was his son he would have taken care of him.

7. With the above evidence, the respondents closed their case.

8. DW-1 was the appellant. He also adopted a witness statement that he had recorded. In it, he stated that he is the biological son of the 2nd respondent being the son of his first wife Marget Gesanga. He thus identified the 1st respondent as his step-brother. He stated that his mother differed with his father while he was very young. She left him and other siblings living with their father at home. After some time, his mother remarried and it was this other man who buried her when she died. He claimed that the 2nd respondent subdivided the parcel No. 783 into two, one portion for himself and his brother and sister, and the second portion to his stepmother i.e mother of the 1st respondent. He stated that himself and his siblings lived peacefully with their stepmother until his sister got married and his brother died. He stated that his stepmother wanted the land subdivided again on the basis that he now owns the largest share as his sibling had died. He stated that the 1st respondent cooperated with her and started claiming that he was not his son and must vacate the land. He reported to his uncles and village elders. He stated that in 1996, the community and his uncles, agreed that the 2nd respondent must recognize him as his first born son and be given the ancestral land. He stated that as the dispute grew, he approached clan elders in 2012 who wrote a letter to the area chief affirming the averments in the meeting of 1996. He stated that in 2011 he reported the subject matter before the Keumbu Land Disputes Tribunal and that the same was heard, and it was determined that he was entitled to a share of the parcel No. 783. He stated that in 2020 he was served with summons in this suit and he then realized that the portion he was in occupation of was registered in the name of the 1st respondent. He claimed to have been in occupation of the land since he was born in 1985. Among the exhibits he produced was a Birth Certificate issued on 23 March 2016.

9. Cross-examined, he testified that his mother is deceased and he does not know where she was buried. He asserted that his father should give him land. He stated that this is ancestral land and he is entitled to a share.

10. DW – 2 was Abel Gesicho Nyamwamba. He testified that the 2nd respondent is his uncle. He had a witness statement wherein it is stated that the 2nd respondent hates the appellant for reason that his mother got married to another man. He was of the view that the appellant is entitled to a portion of the land parcel No. 783. He averred that the title of the 1st respondent should be cancelled as this is the share of the appellant's mother in accordance with Kisii Customary law.

11. DW – 3 was Mellen Nyanchoka. She had a witness statement in which she stated that the 2nd respondent is his brother. The other part of the statement was precisely similar to what was stated in the statement of DW-2. Cross-examined she stated that she does not know the mother of the appellant.

12. With the above evidence the appellant closed his case.

13. Counsel were invited to file submissions culminating into the impugned judgment. In his judgment the trial Magistrate found that there was no doubt that the 1st respondent was the registered proprietor of the suit land parcel No. 2151. He also found that the land was originally registered in name of the 2nd respondent as parcel No. 783 before he subdivided it into the parcels No. 2150 and 2151. On the issue whether the appellant had proved to be a son of the 2nd respondent, the trial Magistrate was not convinced that the display of a Birth Certificate was good enough. He thought that this required more scientific evidence such as a DNA. He did not think that there was clear evidence that the appellant was son of the 2nd respondent. He further held that failure by the owner of the land to consult a party did not amount to fraud and he did not find any evidence of fraud. He was not persuaded that it was enough to allege that the land was transferred without the knowledge of the appellant. He found that it was uncontested that the appellant had trespassed into the suit land. He allowed the case of the 1st respondent with costs and gave the appellant 60 days to vacate. He however did not allow the claim for mesne profits.

14. Aggrieved, the appellant has now lodged this appeal. Four grounds of appeal are raised being :

    i. That the trial Magistrate erred in law and in fact in failing to exhaustively and cumulatively evaluate the evidence on record and thus arrived at an erroneous conclusion by dismissing the appellant's suit.

    ii. That the trial Magistrate erred in law and in fact in not finding that the subdivision of the land parcel No. 783 leading to creation of the parcel No. 2151 was done fraudulently and without due process.

    iii. That the trial Magistrate erred in law and fact in holding that the 2nd respondent was not a party in the suit before the trial court.

    iv. That the trial Magistrate erred in law and fact in finding that the appellant was not the 2nd respondent's son.

15. The appellant prays that the judgment be set aside and the counterclaim be allowed. In the alternative he seeks that the matter be heard afresh before a different Magistrate. He also seeks costs of the suit and of this appeal.

16. I invited counsel to file written submissions towards the appeal, which they did, and they also highlighted the same by making oral submissions at the hearing of the appeal.

17. In his oral submissions, Mr. Mbaka, learned counsel for the appellant, submitted that this was a case where a father has conspired with one of his sons to disinherit the appellant who is also a son. He submitted that the appellant has been on the suit land for a long time and this is where he calls home. He faulted the trial Magistrate for not holding the Birth Certificate to be prima facie evidence of paternity. He pointed out that the local administration was in full support of the case of the appellant. He submitted that if the appellant was to be ejected this would be a recipe for chaos. Mr. Njau, learned counsel for the respondents, submitted inter alia that the question whether the appellant was son of the 2nd respondent was canvassed by the trial court and the court found that only a birth certificate was produced. He asserted that the appellant trespassed into the suit land in 2019 and had never lived there before. He submitted that a parent does not have to consult with a child when dealing with his land and referred to various authorities on this point. He submitted that even if the appellant was a son, this would be a red herring.

18. In his rejoinder, Mr. Mbaka submitted that the suit property is ancestral land and the issue of customary trust thus arises pursuant to Section 28 of the *Land Registration Act*. He submitted that the appellant was therefore entitled to the suit land as of right.

19. I have considered all the above together with the written submissions of counsel. I have in mind the duty of this appellate court, being a first appellate court, which duty was set down in the oft cited case of Selle & Another vs Associated Motor Boat Company Limited & Others (1968) EA 123. It was stated as follows by Sir Clement De Lestang, VP at page 126 :

> " An appeal to this court from a trial by the High 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 aspect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has 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 demeanour of a witness is inconsistent with the evidence in the case generally.

20. This duty was reiterated in the case of Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, where the court stated thus :

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

21. It is also worth mentioning that an appellate court will only interfere with the judgment of the lower court if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in the case of Makube v Nyamuro [1983] KLR at page 403, where it was held that:

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

22. The case of the 1st respondent was simple; that he owns the suit land and the appellant has no rights over it. The appellant in his counterclaim claimed that this land was land that belonged to his mother and he was therefore entitled to inherit it. He of course contended to be a son of the 2nd respondent, a claim that the 2nd respondent vehemently denied. Being the legal owner of the suit land, prima facie, it is the 1st respondent who is entitled to it unless the appellant proves that he has rights over it. In other words, if the court is not convinced of the veracity of the counterclaim, there would be no reason not to enter judgment in favour of the 1st respondent. I therefore opt to start with analysing the counterclaim to see if it had any substance in it.

23. The counterclaim as framed was that the suit land was fraudulently subdivided and transferred to the 1st respondent. The appellant pleaded that the land was fraudulently transferred because there was not issued any consent of the Land Control Board and that stamp duty was not paid. He added that the transfer was illegally done because he was in possession. In addition he claimed that the 1st respondent had designated distinct portions to his two wives insinuating that the suit land was the portion of his late mother, whom he referred to as the first wife. It will be recalled that the first prayer in his

counterclaim was for a declaration that the subdivision of the parcel No. 783 and creation of the land parcels No. 2150 and 2151 is illegal. He also asked for an order to cancel the registration of the suit land in favour of the 1st respondent.

24. Let me start with the claim that the 2nd respondent fraudulently subdivided and transferred the suit land for reason that there was no LCB consent. Indeed, it is ground (2) of the appeal i.e that the court erred in not finding that the subdivision was illegal. It will be recalled that the 2nd respondent as registered owner of the land parcel No. 783, subdivided it into two, to produce the land parcels No. 2150 and No. 2151. Within the proceedings, it was said that the land parcel No. 2150 was transferred to a brother of the 1st respondent by name of Jason Onkoba. He was however not made a party to the suit. In his submissions, Mr. Njau, learned counsel for the respondents, pointed out that no suit was instituted by the appellant to impeach the second title, that is the land parcel No. 2150. There is certainly substance in that argument. I am aware that in the judgment, the trial court stated that James Bonuke was not made a party to the case which is ground 3 of the appeal. I am not sure whether in the judgment he meant that Jason Onkoba (brother of the 1st respondent) was not joined to the suit, or whether it was simply a mistake to say that James Bonuke was not joined to the case, for indeed Jason Bonuke (father of the 1st respondent) is the 2nd defendant in the counterclaim. Whatever the case, what is clear is that the owner of the land parcel No. 2150 was not joined, and that being the case, the appellant could not succeed in his declaration in prayer (a) of the counterclaim. Granting the declaration as prayed in prayer (a) of the plaint would mean affecting the parcel No. 2150 yet the proprietor thereof was not joined. To succeed, he needed to also sue the proprietor of the land parcel No. 2150.

25. But even if we put the foregoing aside, the appellant never led any evidence from the Land Registrar or other land official that the suit land was created without there being an LCB consent or without payment of stamp duty as he had claimed. You cannot just allege that due process was not followed without leading any evidence to that effect. It is trite that the burden of proof is on he who alleges pursuant to Section 107 of the *Evidence Act*. The appellant could have brought some evidence, say from the office of the Land Registrar, to demonstrate that the land parcel No. 783 was subdivided without the requisite LCB consent or payment of stamp duty. He called no such evidence. Without leading any evidence the burden could not be shifted to the respondents to now demonstrate that the requisite LCB consents and stamp duty were paid. I am indeed not persuaded that there was any proof of the allegations of want of LCB consent or non-payment of stamp duty. I find no substance in the allegation of fraudulent subdivision and transfer of land. I therefore find no substance in ground 2 of the appeal. That being the case, prayer (a) of the counterclaim is not capable of being granted.

26. I will now turn to whether the appellant demonstrated that the title of the 1st respondent to the suit land should be cancelled and he be registered thereof as proprietor as he had sought in prayer (b) of his counterclaim. This bit of the appellant's case was based on the assertion that he is entitled to the suit land because he is the son of the first wife of the 2nd respondent. This was of course categorically denied by the respondents and I will take a closer look at this contention. But before I embark on it, there was a dispute on the fact of the time of possession which I have not seen addressed in the judgment. The 1st respondent came to court claiming that his land has recently been invaded. The appellant claimed to have been living in it. I did not see the witnesses but I am more inclined to believe the version of the 1st respondent which was supported by the 2nd respondent. I am not persuaded that the appellant was always in occupation of the suit land otherwise there would be evidence of how they have been living and relating side by side with the respondents. I believe the part of the evidence of the respondents that the appellant came to the land from another location and decided to reside on it on the basis that he is son of the 2nd respondent.

27. On the issue of whether he is son of the 2nd respondent, I of course have no way of telling whether the appellant is son of the 2nd respondent and can only make a determination based on the evidence presented. What the appellant produced as proof was a birth certificate.

28. In his submissions, Mr. Mbaka, learned counsel for the appellant, referred to Section 26 (4) of the *Births and Deaths Registration Act*, which provides as follows :

> (4)A certified copy of any entry in any register or return purporting to be sealed or stamped with the seal of the Principal Registrar shall be received as evidence of the dates and facts therein contained without any or other proof of such entry.

29. In his rejoinder, Mr. Njau referred to Section 12 of the same Act which provides as follows :

> 12. Entry of father in register
>
> No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom.

30. We have to put Section 26 into context and I find it prudent to set out the whole of it.

> 26. Inspection of registers and provision of copies and certificates

1. Any register, return or index in the custody of the Principal Registrar shall, subject to the rules, be open to inspection on payment of the prescribed fee.
2. The Principal Registrar shall, on payment of the prescribed fee, furnish a certified copy of any entry in any register or in any return in his custody.
3. The Principal Registrar shall, on payment of the prescribed fee, furnish a certificate in the prescribed form of the birth of any person compiled in the prescribed manner from the records and registers in his custody.
4. A certified copy of any entry in any register or return purporting to be sealed or stamped with the seal of the Principal Registrar shall be received as evidence of the dates and facts therein contained without any or other proof of such entry.

31. The context of Section 26 relates to inspection of registers and provision of copies and certificates of births and deaths. In other words, Section 26 obligates the Registrar of Births and Deaths to maintain registers relating to births and deaths. He is then directed at subsection (2) to furnish a certified copy of an entry in his register. On payment of the prescribed fee, he can furnish a certificate pursuant to subsection (3). It is this copy, issued by the Registrar, following the records that he has, that is received in subsection (4) as evidence of the date and the facts contained therein without needing to prove such entry. In other words, you do not need to avail the register in the custody of births and deaths because the certificate he has produced is sufficient proof of the entry. What Section 26 (4) affirms is that the Registrar has an entry in the register relating to the birth of the person in issue. Now it is one thing to have an entry and it is another to prove that the entry is correct. It cannot be said that Section 26 (4) is proof that the entry is correct and such entry can be contested, in which case the correctness of the entry needs to be subjected to proof.

32. I have had a keen look at the Certificate of Birth. The same shows that Jason Achochi (appellant) was born on 1st January 1985 and that his father is James Bonuke Gesicho and his mother is Margret Moraa.

The Certificate shows that the informant is 'self' which would mean that it was the appellant himself who provided the information in the birth certificate. I see that the said birth of the appellant was registered on 23 March 2016. In essence, he was not registered by his parents immediately after his birth in 1985. It simply means that the appellant walked into the office of the Registrar of Births and Deaths in the year 2016, declared to the Registrar that he was born on 1st January 1985, and that his mother and father are James Bonuke Gesicho and Margret Moraa. This was not a registration that was done by the 2nd respondent, the alleged father of the appellant, and neither was it a registration done by Margret Moraa, the mother of the appellant. It was thus not an entry made pursuant to Section 12 of the Births and Deaths Act and it was within the right of the 2nd respondent to contest it. In essence the appellant took upon himself to register himself as having been born on the particular date and named the two persons as his parents. Such birth certificate must be treated with caution because it does not emanate from information received from the parents themselves. There is certainly a huge risk of an individual giving information which would favour his cause.

33. In dealing with this issue of the Birth Certificate, Mr. Mbaka submitted that the burden shifted to the 2nd respondent to show that it was not properly acquired and he referred to the holding in the case of Re Estate of Samuel Muriuki M'ibara (Deceased) [2022] eKLR at paragraphs *23* respectively. In the case, the respondents did not lead any evidence to demonstrate that the birth certificate was acquired by any other means than as provided for in the law and the court held as follows :

> " From the evidence on record, there is no dispute that the certificates of birth to the 2nd Administrator and the Interested Party were issued long after the death of the deceased. However, the 1st Administrator has led no evidence to demonstrate that the said certificates were acquired by any other means other than as provided for in the law above.

34. He also referred to the case of Joachim Ndaire Macharia Vs Mary Wangare Ndaire And Anor (2008) Eklr where the court held that the name of the father appearing on the birth certificate was sufficient proof of paternity. It was stated as follows :

> " It is clear from the record that the birth certificate of the 2nd minor tendered in evidence was a certified copy and had the seal of the principal registrar. Accordingly, it was receivable in evidence. The dates and facts contained therein cannot therefore be challenged. The important fact contained therein was that the Page 4 of 12 appellant was shown as the father of the 2nd minor. The respondent need not call any other evidence to prove paternity therefore. That entry is sufficient to attach the 2nd minor's paternity to the appellant."

35. On the other hand, Mr. Njau referred me to the case , Re Estate of Elijah Njenga Ng'ang'a (Deceased) (Succession Cause 56 of 2017) [2022] KEHC 15791 (KLR) (1 December 2022) (Judgment) - Neutral citation: [2022] KEHC 15791 (KLR) where Kariuki J stated as follows :

> " A Birth certificate alone, especially one which is subject to scrutiny, cannot be sufficient evidence of that the Appellant is the 2nd Respondent's son. It is not foreign for people to come up after the death of a person to claim that they are either a son or daughter of the deceased for purposes of claiming a stake in the deceased's estate. In my view, the production of the birth certificate alone is not proof that that child is the deceased's. Sentiments echoed in In re Estate of Patrick Mwangi Wathiga-Deceased [2015] eKLR as relied on by the Petitioner."

36. We need to put everything into context. I have read the case of Joachim Ndaire Macharia vs Mary Wangare Ndaire (supra). The dispute therein was over child maintenance. During the trial, the

respondent, as mother, produced a Birth Certificate to prove that the appellant was the father and also called the evidence of her father who testified that the appellant made a donation of an ewe for reason that he had impregnated the respondent. It was held that this was adequate proof. Here, unlike the case we have, it was the mother producing the Birth Certificate, not a child pronouncing himself to have been sired of two persons. The case is thus distinguishable from our case. In Re Samuel Muriuki M'Ibara (2022) eKLR, there had been contention that the applicant was not a daughter of the deceased and that she was a stranger. To overcome this allegation, the applicant produced not only a Certificate of Birth but also a Birth Notification, a health card, and some eulogies where she had been recognized as daughter of the deceased. Although the Certificate of Birth had been issued after the death of the deceased, it was certainly backed up by other evidence.

37. In my opinion, the cases referred to by Mr. Mbaka are distinguishable from the situation at hand. In our case, there is no other documentation to support the Certificate of Birth. In his submissions, Mr. Mbaka pressed that there was in addition oral evidence from other witnesses who stated that the appellant was son of the 2nd respondent. That cannot be taken too seriously either. Neighbours, relatives, and such other persons may of course assume that an individual is the child of another person but they could as well be mistaken. The person who may truly know the identity of the father of the child is the mother, and to some extent the father, unless there is notoriety through living together and holding out, that a particular person is the child of another but which is not the case here.

38. Apart from the mere mention by the other witnesses that the 2nd respondent is father of the appellant there was no other evidence to support the claim of the appellant. The appellant himself never led any evidence of any marriage between his mother and the 2nd respondent. There was indeed no proof of any marriage between his mother and the 2nd respondent. There was also no evidence led by the appellant to show how he grew up over the years, whom he lived with, where he went to school, when he started fending for himself, what relationship he had with his father and such like matters which would probably have buttressed his claim that the 2nd respondent is his father.

39. The trial court was not convinced that the Birth Certificate was sufficient to prove that the appellant was truly the son of the 2nd respondent. I am not moved to disturb that finding of fact. The circumstances surrounding the issue of the Birth Certificate to the appellant call it into question, and I am persuaded that corroborating evidence was needed given that the 2nd respondent had denied that the appellant was his son.

40. I am therefore not persuaded to set aside the finding of the trial Magistrate that the appellant did not prove to the required standard that he was indeed a son of the 2nd respondent.

41. But I would not even think that the issue of whether the appellant is son of the 2nd respondent is very material in the circumstances of this case. The mere fact that one is a child of another does not by reason of that only, mean that the parent holds land in trust for the child. I had occasion to discuss this in the case of Oganga & another v Orangi & 3 others (Environment & Land Case 466 of 2015) [2023] KEELC 16348 (KLR) (22 March 2023) (Judgment) Neutral citation: [2023] KEELC 16348 (KLR). There is no trust created merely by virtue of a parent/child relationship. Thus, a parent does not maintain his property in trust for his children by virtue of that relationship alone. There has to be more.

42. In his submissions, Mr. Mbaka submitted that this was a case of a customary trust. Well if that was the case, then proof of custom, and proof of the trust pursuant to that custom, needed to be provided.

This indeed is what the Supreme Court held in the case of Isack M'inanga Kiebia vs Isaaya Theuri M'Lintari & Another (2018)Eklr that :

> " .... Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favor of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.

43. It is therefore a question of the quality of evidence presented. I am afraid that the evidence given by the appellant was too thin to prove any such customary trust that obligated the 2nd respondent to subdivide land to him in any particular way. The appellant never held himself out as an expert in Gusii customary law. Neither did any of the other witnesses of the appellant claim to be experts in Gusii customary law. DW-3 was an aunt and all she said was that the appellant is son of the 1st wife and that he is entitled to a portion of the land parcel No. 783. She said that this was the share of his mother as per Kisii customary law. This was exactly what DW-2 also said. But they never gave any elaborate evidence of what this custom entails, how it applies, and whether there are any exclusions. It cannot, in those circumstances be said that it was proved that the appellant was entitled to the suit land through Gusii Custom. It was of course alleged that this was the share of his mother. How was it the share of his mother ? What acreage of land would the appellant's mother be entitled to ? Would the appellant's mother still be entitled to land despite evidence that she was married elsewhere which is where she was buried ? These were important issues that needed concrete evidence from experts in Gusii Customary law to testify upon and were never canvassed in the evidence of DW-2 and DW-3. I reiterate, you cannot merely make a statement that 'this is the custom' without providing any elaboration on the same. Without such elaboration, you cannot say that the custom was proved. Without proving such custom, then the claim of the appellant to the suit land by dint of Gusii Customary law cannot have support and it must fail.

44. The above aside, the witness appeared to suggest that this land was the share of the appellant's mother and because of that the appellant could claim it. Now, if it was the share of his mother, the appellant did not file the suit on behalf of the estate of his late mother. If he was claiming what his mother would be entitled to, then this would be claim for the estate of his late mother, in which event he would need to have a grant of letters of administration for the estate of his late mother. He certainly did not file suit on behalf of the estate of his late mother and he made no claim for the benefit of the said estate in respect of the suit land.

45. Whatever the case, if the appellant thought that he had a case for some land that his father owned, he ought to have filed suit to claim it. He could not simply take it upon himself that the land now

registered in the name of the 1st respondent is what belongs to him. And pray, why would he seize this land belonging to the 1st respondent and not the other parcel No. 1250 which is registered in the name of the brother to the 1st respondent ? That again was never explained. On what basis did he pick and chose the land belonging to the 1st respondent ? We cannot encourage a situation of anarchy where a person simply comes from nowhere and takes possession of another person's land on the assertion that the land ought to have been given to him instead.

46. I am persuaded, just as the trial court did, that the 1st respondent made out a case of trespass against the appellant. He was the registered proprietor of the suit land and it was him who was vested with rights over the land including the right of exclusive use and possession. I am persuaded, just as the trial court did, that the appellant did not make out any case for entitlement to the suit land and his counterclaim was for dismissal.

47. It will be seen that I see no merit in this appeal and it is hereby dismissed with costs. I observe that in his judgment, the trial court gave the appellant 60 days to give vacant possession. That period is now long gone. I will give the appellant 14 days to give vacant possession. In default he be evicted.

48. Judgment accordingly.

**DATED AND DELIVERED THIS 3RD DAY OF APRIL 2025**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

Delivered in the presence of :

Mr. Mbaka for the appellant

Mr. Njau and Mr. Moronge for the respondents

Court Assistant – Michael Oyuko