



REPUBLIC OF KENYA



**KENYA LAW**  
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**Misiko & 3 others v Mukolongo (Environment and Land Appeal  
18 of 2020) [2025] KEELC 1078 (KLR) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1078 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL 18 OF 2020**

**EC CHERONO, J**

**MARCH 6, 2025**

**BETWEEN**

**CAROLINE NASIMIYU MISIKO ..... 1<sup>ST</sup> APPELLANT**

**VERONICA MAYUMBA ..... 2<sup>ND</sup> APPELLANT**

**PETRONILA KISAKA ..... 3<sup>RD</sup> APPELLANT**

**BERNADETTE LUMBASI ..... 4<sup>TH</sup> APPELLANT**

**AND**

**HENRY WANDABWA MUKOLONGO ..... RESPONDENT**

*(Being an appeal from the judgment by Hon. M. Munyekenye  
(PM) in Webuye SPM ELC 1 OF 2019 delivered on 23/09/2020)*

**JUDGMENT**

1. This appeal arises from the decision of the trial Magistrate in the case of Caroline Nasimiyu Misiko, Veronica Mayumba, Petronila Kisaka And Bernadette Lumbasi –where the Appellants herein were the plaintiffs while Henry Wandabwa Mukolongo -the Respondent was the Defendant.

**Background**

2. The suit before the trial court was instituted by the Appellants vide a plaint dated 08/01/2021 where they averred that they are the daughters of the late Isaac Mukongolo Kisaka(dcd) by his 2<sup>nd</sup> wife namely Mary Nablwa Mukongolo(dcd) while the Respondent was their step-brother being the son of Isaac Mukongolo Kisaka(dcd) 1<sup>st</sup> wife. That during his lifetime Isaac Mukongolo Kisaka(dcd) lived with his two wives in land parcel no. Ndivisi/Mihuu/54 (hereinafter referred to as ‘the suit land’) with his 1<sup>st</sup> wife occupying 2 acres while the 2<sup>nd</sup> wife occupied 1 ½ acres until her death on 05/08/2018.



3. That Isaac Mukongolo Kisaka(dcd) also owned land parcel no. Ndivisi/Mihuu/76 and 122 which was jointly owned with one of his sons. That the Respondent fraudulently obtained registration of the suit land in his name and that as the children of Mary Nablwa Mukongolo, they were entitled to 1 ½ acres occupied by their mother and that the same should be registered in their names in trust. They prayed for judgment against the Respondent in the following terms;
  - a. 1 ½ acres which was occupied by the late Mary Nablwa Mukongolo be separated from land parcel no. Ndivisi/Mihuu/54 and registered in their joint names as per paragraph 7 and 8 hereof.
  - b. Costs of this case.
  - c. Any other or further orders as this court may deem fit to grant.
4. The Respondent in his defence filed a statement of defence dated 08/02/2019 where he denied the Appellants' case. He averred that although their deceased persons were buried on the suit land, the same is registered in his name having been gifted to him by his father in 1994. That the land was therefore not subject to succession and that he was not engaged in any fraudulent activities. He also argued that this suit was res judicata as a result of Bungoma HCCC No. 5 of 2004.
5. The Appellants filed a reply to defence dated 13/03/2019 where they set out particulars of fraud against the Respondent to the extent that he presented transfer forms for the transfer of the entire suit land by taking advantage of the deceased illiteracy and for procuring a transfer without the consent of the Land Control Board. They also argued that they were not parties in Bungoma HCCC No. 5 of 2004 as asserted by the Respondent.
6. When the suit came up for directions, The suit proceeded by way of viva voce evidence where both parties called one witness each.
7. PW1 Carolyne Nasimiyu Misiko adopted her witness statement dated 13/3/2019 as her evidence in chief. She also produced into evidence her list of documents which contained 7 items as PExhibit 1-7. She further produced her supplementary list of documents which contained proceedings in LDT no. 118/1996 as PExhibit 8. In cross-examination she testified that Bungoma HCCC No. 5 of 2004 was between her mother Mary Nablwa Mukongolo and the respondent. It was also her evidence that the appellants are not living in the land. In re-examination it was her evidence that prior to her mother's demise, the respondent was already registered as the proprietor of the suit land.
8. DW1 Henry Wandabwa Mukongolo adopted his witness statement dated 08/01/2019 as her evidence in chief. He also produced into evidence his list of documents which was a decree in Bungoma ELC No. 5/2004. In cross-examination the witness testified that he got his title on 05/09/1994 after he obtained a consent from the Land Control Board
9. After considering the testimony of the witnesses and the evidence adduced by the parties, the trial magistrate rendered herself by dismissing the suit on 23/09/2020 on grounds that it was res-judicata with no order as to costs.
10. Being aggrieved with the trial court's ruling, the Appellants preferred the current appeal on the following grounds;
  - a. That honourable Magistrate erred in law in holding that the appellants suit was res judicata when it was not.
  - b. The judgment was against preponderance of the evidence adduced by the parties.



- c. The honourable magistrate erred in law in holding that the pleaded element of fraud should have been raised in the earlier suit when there was no earlier suit between the parties.
  - d. The honourable magistrate's judgment is premised upon mere legal technicalities and has denied the appellants' substantial justice.
11. The appellant sought the following orders;
- a. This appeal be allowed with costs.
  - b. In the place of judgment dismissing the appellants case an order be made allowing their claim for 1 ½ acres out of land parcel no. Ndivisi/Mihuu/54.
12. When this appeal came up for directions, the parties agreed to have the same canvassed by way of written submissions. The Appellant filed their submissions dated 13/02/2025 where they averred that the trial court erred in its findings. The Respondent on his part filed his submissions dated 02/12/2024 where he argued that the trial court was correct in her finding and urged the court to dismiss the appeal with costs.

### **Legal Analysis And Decision**

13. I have considered the appeal, submissions and the authorities relied on by the parties. I have also considered the impugned judgment and the trial court's record. This being a first appeal, parties are entitled to and expect a rehearing, reevaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.
14. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;
- [A]n appeal to this Court from a trial...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 allowances in this respect.
15. The Appellants have faulted the trial court on various grounds as can be seen from their grounds of appeal. In my view, only two issues arise for determination in this appeal, namely; whether the former suit was res judicata and whether the Appellants proved their claim on a balance of probabilities.
16. I shall consider the issue of res judicata first because of its well know implications on a suit. The Respondent herein had argued that this suit was res judicata since the issues therein had been litigated on in Bungoma ELC No. 5/2004 where the court declared itself on the issues before it which according to the trial Magistrate appeared to have been in issue in the subsequent suit. As stated elsewhere in my analysis, the former suit was instituted by one Mary Mukongolo(now deceased) against the Respondent. The Appellants herein confirm that the said Mary Mugongolo(deceased) was their mother.



17. The substantive law on Res Judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”
18. The Black’s law Dictionary 10<sup>th</sup> Edition defines “res judicata” as
- “An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”
19. Ideally, the concept of res-judicata is to a bar any person from commencing more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving similar parties and property(ies) in dispute in an action so as to avoid multiplicity of actions.
20. In determining whether an issue in a subsequent suit/action is res judicata, a court of law should always look at the Decision alleged to have settled the issues in question and the subsequent suit to ascertain;
- i. what issues were really determined in the previous suit;
  - ii. whether they are the same in the subsequent suit and were covered by the Decision.
  - iii. whether the parties are the same or are litigating under the same Title and that the previous suit was determined by a court of competent jurisdiction.
21. From a perusal of the decree in the former suit produced as D-Exhibit 1, it emerges that the plaintiff, Mary Mkongolo sued the Respondent herein for the following orders;
- a. An injunction to issue restraining the defendant (the respondent herein) by himself, servants, agents and or employees from in any way interfering with the plaintiff’s (the appellants’ mother) quiet occupation of designated portion in Parcel Number Ndivisi/Mihuu/54 for her lifetime
  - b. The declaratory order sought in paragraph 11 above.
  - c. Costs of this suit.
  - d. Interest on (b) above.
  - e. Any other or further relief that the honourable court may deem fit and expedient to grant.
22. The award of the court in the said suit was by way of a consent that;
- a. The plaintiff be an is hereby allowed the use of the portion she occupies on Ndivisi/Mihuu/54 for the entire of her lifetime.
  - b. Each part to bear their own costs.
23. Looking at the two suits, it is evident that the claimants are different. Further, the claimant in the former said suit presented it on her own behalf and not in a representative capacity such that the



interests of the Appellants cannot be said to have extinguished. Although the Respondent did not attach the pleadings in the former suit, it can be discerned from the materials on record that the cause of action and prayers sought in the former suit are different from the subsequent suit. While the claimant in Bungoma ELC No. 5/2004 sought for inter alia injunctive orders, the Appellants claim in the subsequent suit is a claim for a portion of the suit land measuring 1 1/2 . On those grounds, it is my considered view that the subsequent suit was not res judicata.

24. On the second issue, it was the Appellants' contention that the Respondent obtained title to the suit land fraudulently and without following the requisite procedure and by taking advantage of their fathers' illiteracy. The Respondent on his part argued that the suit land was gifted to him by his father and that his title was proper and regular. It is not in dispute that the Respondent is the registered owner of the suit land.
25. Section 24 of the *Land Registration Act* No 3 of 2012 states that 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. Section 25 of the said Act provides that the rights of a proprietor, whether acquired on first registration or 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—to encumbrances charges or leases shown on the register and the overriding interests as stated in Section 28 of the Act.
26. Section 24 (a) the *Land Registration Act* provides thus;

“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”
27. Section 26 of the *Land Registration Act*, 2012 provides;
  - (1) 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.
28. The courts are therefore mandated by statute to consider a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated above.
29. Further, Courts have held for the umpteenth time that in circumstances where title to property is challenged, it is not enough for the proprietor of that property to wave the title as proof of ownership, but he/she must go beyond and prove the legality of the said title. This was the finding of the Court of Appeal in the case of *Munyu Maina –v- Hiram Gathiha Maina* (2013) eKLR where the court held:

“We state 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 would not be noted in the register.”

30. Where a party is challenging acquisition of title on grounds of fraud, it behoves such person to discharge his burden of proof under Section 107 and Section 109 of the Evidence Act. Section 107, Evidence Act which provides as follows:
- “ 1. Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.
  2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”
31. In support of their claim, the Appellants presented minutes from a meeting of the Mukongolo Kisaka family held on 01/06/1998 where 1st Respondent was also in attendance, and the meeting resolved that the Appellants' mother, Maria Mukongolo, be granted the use of 1 ½ acres of the suit land and that the Respondent should not evict her. This resolution appears to have been influenced by a case filed at the District Tribunal, as evidenced by entries in the land register submitted as P-Exhibit 3 and contents of the meeting referred to above.
32. From my understanding of the foregoing, it is clear in my mind that the intention of Mukongolo Kisaka was for the Respondent to hold the suit land in a fiduciary capacity on her behalf and on behalf of her children who are the Appellants herein under the African customary law. I am guided by the proviso to section 28 of the Registered Land Act that the Respondent's registration does not “relieve him as a proprietor from any duty or obligation to which he is subject as a trustee”
33. I am further guided by the findings of the Supreme Court of Kenya in the case of Isack M'inanga Kiebia vs Isaaya Theuri M'lintari & another [2018] eKLR which set the elements that would qualify a claimant as a trustee. Further, in the case of Salesio M'Itonga Vs M'Ithara & 3 Others (2015) EKLR the Court of Appeal stated that trust is a question of fact and has to be proved by evidence. In this case, the Appellants led evidence which was not controverted by the Respondent herein that the suit land was inherited by the Respondent from his father and therefore would follow that the suit land is an ancestral land which passes from one generation to another under the doctrine of intergenerational equity. In the case of Mbui Mukangu v Gerald Mutwiri Mbui [2004] eKLR though the land was registered in the name of 1<sup>st</sup> Respondent, it was ancestral land that devolved to him from his father. It is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations.
34. The Respondent argues that the Appellants are not in occupation of the claimed land. However, in George Mbui Kiebia & another v Isaya Theuri M'lintari & another [2014] eKLR the Court of Appeal held that one need not be in possession or occupation to prove customary trust.
35. Further, the Appellants herein claim 1 ½ acres of the suit land by virtue of being the daughters of Mukongolo Kisaka. It is not denied that the parties herein are the children of the said Mukongolo Kisaka save that they are of different wives with the Respondent being the son of the 1<sup>st</sup> wife and the Appellants being the children of the 2<sup>nd</sup> wife. The court has already found that a customary trust exists over the suit land. It means therefore that although the suit land is registered in the name of



the Respondent, the Respondent is holding the land subject to the customary trust in favour of the Appellants in accordance with the provisions of Section 28 *Land Registration Act*.

36. It is therefore my considered view that the Appellants proved their case on a balance of probabilities and as such, this appeal is merited and the same is allowed as prayed.

37. There shall be no orders as to costs.

38. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 06<sup>TH</sup> DAY OF MARCH, 2025.**

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**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of:

1. Mr. Alovi for the Appellants.
2. Respondent/Advocate-absent.
3. Bett C/A

