Godana v Fakir (Environment and Land Appeal E0027 of 2024)
[2025] KEELC 5173 (KLR) (7 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5173 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL E0027 OF 2024

JO MBOYA, J

JULY 7, 2025

BETWEEN

CHACHU MOHAMED GODANA ..... APPELLANT

AND

ALINOOR FAKIR ..... RESPONDENT

JUDGMENT

1. The Respondent [who was the Plaintiff in the lower court] filed the Plaint dated 19th January 2022 and wherein same [respondent] sought the following reliefs:

    a. A declaration that the parcel of land Isiolo Township Block 4/47 belongs to the Plaintiff.

    b. An order of permanent injunction restraining the defendant/ his agents, servants or anyone acting on his behalf from entering, cultivating, developing, utilizing, fencing, alienating, selling, constructing or in any other way interfering with the plaintiff's plot no. Isiolo Township Block 4/47.

    c. Costs interests and any other relief this honourable court may deem just and expedient to grant.

2. The appellant herein [who was the Defendant in the Lower Court] duly entered appearance and thereafter filed a statement of defence dated 14th April 2022 and wherein the appellant denied the claims by the respondent. Furthermore, the appellant herein contended that the suit property was lawfully allocated to one Mohamed Godana [now deceased] who was the appellant's father. In addition, the appellant contended that upon the allocation of the suit property, his father, now deceased, duly entered upon, took possession of and remained in occupation of the said property.

3. The statement of defence under reference was subsequently amended vide amended statement of defence and counterclaim dated 6th February 2023. The appellant sought the following reliefs vide the counterclaim.

a. This Honourable court do make a declaration that the plaintiff in this counterclaim has gained ownership through operations of law [adverse possession]

b. This court do grant an order of permanent injunction restraining the defendants and or his agents from interfering with the plaintiff's quiet user Block number Isiolo Township Block 4/47

c. Cost of this counterclaim be provided for.

4. The suit before the subordinate court was heard and disposed of vide judgment rendered on 8th November 2024, whereupon the learned trial court found and held that the respondent had duly established his claim to and in respect of the suit property. To this end, the trial court proceeded to and granted orders at the foot of the Plaint. On the contrary, the learned trial court found and held that the appellant's claims to the suit property were unsubstantiated.

5. It is the said judgment and the consequential decree which has aggrieved the appellant, culminating into the filing of the memorandum of appeal dated 22nd November 2024 and wherein the appellant has highlighted the following grounds of appeal;

i. That the learned trial magistrate erred in law and in fact by failing to recognize that the disputed property, Isiolo Township Block 4/47 lawfully belonged to the late Mohamed Godana and any claim against the property should have been directed at his estate making the suit against the appellant in his personal capacity procedurally defective and legally untenable.

ii. That the learned trial magistrate erred in law and in fact by disregarding the findings of the 2010 land dispute committee which conclusively determined that the disputed parcel belonged to the late Mohamed Godana.

iii. That the learned trial magistrate erred in law and in fact by failing to consider the fact that the appellant had been in occupation of the suit property and made extensive developments thereon thus acquiring adverse rights.

iv. That the learned trial magistrate erred in law and in fact by failing to determine the appellant's counterclaim.

v. That the learned trial magistrate erred in law and in fact by dismissing credible evidence from the appellant, including a claim letter of allotment, approved part development plan and supporting documentation, demonstrating the appellant's family's long-standing possession, occupation and development of the property for over 25 years.

vi. That the learned trial magistrate erred in law and in fact by relying solely on the respondent's certificate of lease issued in 2021 despite inconsistencies and procedural irregularities in the respondent's chain of documentation which cast doubt on the authenticity of the title.

vii. That the learned trial magistrate erred in law and in fact by granting a permanent injunction against the appellant without sufficient evidence of the respondent's exclusive possession of the suit property.

viii. That the learned trial magistrate erred in law and in fact by considering extraneous circumstances and facts that were not pleaded or even contested by the parties, hence arriving at a wrong decision.

ix. That the learned trial magistrate erred in law and in fact by failing to consider the surveyor's report and the facts therein.

x. That the learned trial magistrate erred in law and in fact by failing to consider the evidence of the appellant and his submissions thereto.

xi. That the decision of the learned trial magistrate was plainly wrong, bad in law and in the eyes of a court of equity and therefore erroneous.

xii. That the judgment delivered by the learned trial magistrate was against the weight of the evidence and resulted in a miscarriage of justice.

6. The instant appeal came up for directions on the 8th April 2025, whereupon the advocates for the parties confirmed that the record of appeal had been duly filed and served. Furthermore, the advocates confirmed that the record of appeal was complete and thus the appeal was ready for hearing.

7. Flowing from the foregoing, the court ventured forward and issued directions pertaining to the hearing and disposal of the appeal. In particular, the court directed that the appeal shall be canvassed by way of written submissions to be filed and exchanged by the parties. Moreover, the court also circumscribed the timelines for the filing and exchange of the written submissions.

8. The appellant proceeded to and filed written submissions dated 12th May 2025; and wherein the appellant has raised and canvassed four [4] salient issues, namely; the learned trial magistrate failed to appreciate that the suit property belonged to Mohamed Gordana[now deceased] and thus the suit ought to have been commenced against the estate of the deceased and not otherwise; the learned magistrate erred in failing to evaluate the totality of the evidence tendered by and on behalf of the appellant; the learned magistrate adopted a slanted and skewed approach and thus failed to discern the material contradiction[s] in the evidence of the respondent; and the learned trial magistrate erred in failing to determine the counterclaim that was filed by the appellant.

9. Regarding the first issue, learned counsel for the appellant has submitted that the suit property was allocated to and in favour of Mohammed Godana [now deceased] and hence any claim touching on and or concerning the suit property could only be mounted against the legal representative of the deceased. Furthermore, it was contended that even though the original suit was filed against the appellant, the appellant herein has never been appointed and or constituted as the legal representative of the estate of Mohamed Godana [now deceased].

10. Arising from the foregoing, learned counsel for the appellant has therefore submitted that the suit that was filed as against the appellant was therefore misconceived in so far as the appellant was not the legal administrator of the estate of the deceased capable of being impleaded and sued.

11. To buttress the foregoing submissions, learned counsel for the appellant has cited and referenced the decision in the case of Virginia Edith Wambui Otieno vs Joash Ochieng Ougo & another (1987) eKLR, wherein it is posited that the Court of Appeal held that a suit against a person who has not been duly constituted as the legal administrator is incompetent.

12. Secondly, learned counsel for the appellant has submitted that the learned trial magistrate failed to properly evaluate, analyse and review the evidence that was tendered by the respondent: and as a result of such failure, the learned trial magistrate arrived at an erroneous conclusion, contrary to the weight of evidence on record.

13. Additionally, it was submitted that because of the slanted and skewed approach deployed by the learned trial magistrate, same failed to discern various contradictions that existed in the evidence tendered on behalf of the respondent. To this end, learned counsel for the appellant has referenced various [sic] discrepancies which same contend, negated the respondent's claim to the suit property. Moreover, it

has been submitted that the learned trial magistrate proceeded to base her decisions on the basis of the certificate of lease without interrogating the validity of the process leading to its issuance.

14. Thirdly, learned counsel for the appellant has also submitted that the learned trial magistrate erred in disregarding the evidence pertaining to the findings of the land disputes committee, which is said to have resolved the dispute pertaining to ownership of the suit property. In particular, it was contended that the land disputes committee rendered findings in 2010 and same held that the disputed land belongs to Mohamed Godana [now deceased].

15. Further and in any event, it was the submissions by learned counsel for the appellant that, where a land disputes tribunal has rendered its decision, such decisions of the disputes tribunals ought to be taken into account by a court of law. Furthermore, it was submitted that the decisions of the land disputes tribunal ought not to be disregarded by a court of law unless there exist compelling reasons to do so.

16. To buttress the foregoing submissions, learned counsel for the appellant has cited and referenced inter alia Republic vs Funyula Land Disputes tribunal (2012) eKLR; In the Matter of the Estate of Chepkonga & another (2014) eKLR and Republic vs Kajiado Land Disputes Tribunal & 3 others (2016) eKLR, respectively.

17. As pertains to the fourth issue, learned counsel for the appellant has submitted that the appellant tendered credible documents, including a letter of allotment, part development plan and minutes of the county council of Isiolo [now defunct], which vindicated the appellant's right to the suit property. However, it was posited that the learned trial magistrate ignored and disregarded the said documents.

18. Additionally, learned counsel for the appellant has submitted that where such kind of document, namely; letter of allotment, part development plan and other supporting documents, are tendered before a court of law, such documents carry substantial weight in proving ownership unless there is clear evidence to the contrary. To this end, learned counsel contended that the documentation tendered by the appellant ought to have been given due weight and attention by the learned trial magistrate.

19. To support the foregoing submissions, learned counsel for the appellant has cited and referenced various decisions, including Githu vs Ndiritu (2019) eKLR, Kimaru vs Land registrar Kilifi & 2 others (2024) eKLR and Njeru vs Njeru (2020) eKLR, respectively.

20. Flowing from the foregoing, learned counsel for the appellant has implored the court to find and hold that the appeal beforehand is meritorious and thus same to ought to be allowed.

21. The respondent filed written submissions dated 26th May 2025 and wherein same has raised and canvassed three [3] key issues namely; the learned trial magistrate correctly evaluated the totality of the evidence tendered by the parties and thereafter came to the correct conclusion as pertains to ownership of the suit property; the appellant herein did not establish any lawful claim and or right to the suit property; the learned trial magistrate determined all the issues in dispute as pertaining to the suit property including the appellants counterclaim, which was held to be unsubstantiated.

22. Having reviewed the record of appeal; the evidence on record [both oral and documentary] and having taking into account the written submissions filed on behalf of the parties, I come to the conclusion that the determination of the instant appeal turns on three [3] key issues, namely; whether the respondent duly established and proved his entitlement to the suit property or otherwise; whether the appellant demonstrated and or proved any lawful rights to the suit property or otherwise; and whether the appellant's counterclaim was determined by the trial court or otherwise.

23. Being a first appeal, this court is vested with the jurisdiction to undertake exhaustive review, appraisal, re-evaluation and scrutiny of the entirety of the evidence tendered before the trial court and thereafter to form an independent conclusion arising out of the evidence on record.

24. Nevertheless, it is imperative to observe that even though this court has the jurisdiction to depart from the factual conclusions and finding[s] of the trial court, such departure must only be undertaken when it is evident that the trial court either acted on a misapprehension of evidence on record; acted on no evidence; where the finding is perverse to the evidence on record, or where it is shown that there exist[s] a demonstrable error of principle, which vitiates [negates] the finding[s] of the trial court.

25. Suffice it to posit that the Jurisdictional remit of the first appellate court was recently re-visited by the Court of Appeal in the case of Kenya Urban Roads Authority & another v Belgo Holdings Limited (Civil Appeal E011 of 2021) [2025] KECA 764 (KLR) (9 May 2025) (Judgment) where the court stated thus;

> 37. We have considered the appeal and this being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same.
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> We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement. This position is anchored in section 78 of the *Civil Procedure Act*, which requires a first appellate court to re-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions of the Superior Courts among them Peters v Sunday Post Limited [1958] EA 424, where the predecessor to this Court expressed itself as follows:
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> > "Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...

> Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

26. Bearing in mind the principles espoused by the Court of Appeal in the decision [supra], I am now disposed to revert to the subject matter and to discern whether the impugned judgment is well grounded or otherwise. Notably, I shall address the issues hereinbefore mentioned sequentially, starting with whether the respondent established his claim to ownership of the suit property or otherwise.

27. Regarding the first issue, it is imperative to recall and to reiterate that the respondent herein filed the suit before the subordinate court contending that the suit property belonged to and was registered in the name of Fakir Ali Jamal Mulji [now deceased] and thus the suit property forms part of the estate of the deceased. To this end, the respondent posited that the estate of the deceased was therefore entitled to exclusive possession, occupation and use of the suit property.

28. Be that as it may, the respondent posited that the appellant herein had entered upon and trespassed onto the suit property, albeit without the consent of the respondent and or the legal representatives of the estate of the deceased. Simply put, the respondent contended that the appellant had trespassed on the suit property.

29. It was the further position of the respondent that the deceased [Fakir Ali Jamal Mulji] had applied to be allocated the suit plot [formerly LR No. 7918/9]. Moreover, the respondent posited that the application by the deceased was duly approved and thereafter the deceased was issued with a letter of allotment by the commissioner of land. For good measure, the appellant tendered and produced assorted documents including a copy of the Kenya Gazette notice; copy of the minutes of the county council of isiolo [duly certified]; copy of revenue receipt in respect of the application fees; copy of the letter of allotment; copy of the revenue receipt in respect of the stand premium; copy of the bankers cheque addressed to the commissioner of lands; copy of the registry index map amendment and copy of the certificate of lease bearing the name of Fakir Ali Jamal Mulji.

30. The documentation which were tendered and produced by the respondent demonstrated the process that was undertaken by the deceased in his endeavour to acquire what is now the suit property.

Instructively, it is worth recalling that what now constitutes the suit property previously formed part of the trust land which was being administered by the county council of Isolo [now defunct].

31. To the extent that what constitute[s] the suit property was previously part of the trust land, it is common ground that any applicant who was desirous to procure allotment was obliged to make the requisite application to the county council of Isiolo [now defunct] and thereafter the county council would be called upon to deliberate on the application. The deliberations of the county council, comprised of recommendations, would thereafter be escalated to the commissioner of lands for purposes of issuance of a letter of allotment. [See Section 53 of the Trust *Land Act*, Chapter 288 Laws of Kenya, now repealed].

32. It is important to underscore that the respondent herein tendered and produced before the trial court plausible, cogent and credible evidence demonstrating the process that was followed up to and including the ultimate issuance of the certificate of lease in favour of Fakir Ali Jamal Mulij[now deceased].

33. Additionally, it is not lost on me that the respondent called the land registrar, namely; Beneah Apandi, who testified as PW3. It was the testimony of the said witness that the suit property was previously referenced as LR No. 7918/9. However, the land under reference was converted and thereafter same was issued with a new title number, namely, Isiolo Township Block 4/47 [namely the suit property].

34. Furthermore, the witness proceeded to and tendered before the court a copy of the Deed Plan [exhibit P2]; copy of the letter of allotment [EX8]; and copy of the letter dated 1st December 2020 from the director Land administration speaking to the loss of the original deed plan and the issuance of a certified copy of the deed plan underpinning the registration of the suit property. In addition, the witness confirmed that the suit property lawfully belongs to Fakir Ali Jamal Murji.

35. The foregoing represents the totality of the evidence that was tendered by and on behalf of the respondent and which evidence the learned trial magistrate appraised and thereafter came to the conclusion that same established a clear chain underpinning the acquisition of the suit property by Fakir Ali Jamal Murji[now deceased].

36. I have perused the content[s] of paragraph 16 of the judgment of the learned trial magistrate and the reasoning thereunder and I beg to state that the learned trial magistrate came to the correct conclusion in finding and holding that the suit property lawfully belonged to Fakir Ali Jamal Murji [now deceased] and whose estate is represented by the respondent.

37. Moreover, it is important to highlight that in arriving at the conclusion that the suit property lawfully belongs to the estate of Fakir Ali Jamal Murji [now deceased] the learned trial magistrate deployed and applied the correct principles enunciated in the case of Mas Construction Limited v Sheikh & 6 others (Civil Appeal E789 of 2023) [2025] KECA 349 (KLR) (28 February 2025) (Judgment] where the Court stated thus:

> This Court in Presbyterian Foundation v Kibera Siranga Self Help Group Nursery School (Civil Appeal 64 of 2014) [2023] KECA 371 (KLR) (31 March 2023) (Judgment) stated as follows regarding a claim over the existence of two titles in respect of the same parcel land: "The best evidence of ownership of immovable property is the title deed to it and that is why the question of the root of title is important. Root of title is the deed to which title to a property is ultimately traced to prove that the owner has good title. Accordingly, when there are competing interests as in this case, the parties are required to give evidence of title, starting with a "good root of title."

A good root of title and an unbroken chain of ownership is required. To be a good root of title, a document must satisfy each of the following requirements:

(a) it must deal with or show the origin of the ownership of the whole legal and equitable interest in the land in question;

(b) it must contain a recognizable description of the property;

(c) it must not contain anything that casts any doubt on the title."

38. In a nutshell, I come to the same conclusion as the learned trial magistrate as pertains to proof of ownership of the suit property.

39. Turning to the second issue, it suffices to observe that the appellant herein had also contended that the suit property was lawfully allocated to Mohamed Gordana [now deceased] in 1998 and thereafter the said Mohamed Gordana entered upon and took possession thereof. Furthermore, the appellant contended that the suit property has been under the occupation of Mohamed Gordana and his family for more than thirty years. [See paragraphs 3a, 8 and 9 of the amended statement of defence filed on behalf of the appellant].

40. To fortify the claim that the suit property was lawfully allocated to Mohamed Gordana [now deceased] the appellant tendered assorted documents including a copy of a letter of allotment dated 20th November 1998; copy of part development plan; copy of uncertified minutes of the county council of Isiolo; assorted receipts pertaining to survey fees in respect of unsurveyed Commercial plot B- Isiolo; and assorted demands for rates issued in respect of plot number 7918/10.

41. To start with, it is important to observe that the letter of allotment dated 20th November 1998 and which has been relied upon by the appellant, does not indicate the county council on whose behalf the same letter of allotment was being issued.

42. Furthermore, the said letter of allotment does not reference the plan number in respect of the property that was allegedly being allocated. Worse still, the letter of allotment that was tendered does not reference the minutes and or authority number underpinning its issuance.

43. Additionally, it is important to highlight that the appellant did not tender and or produce any acceptance letter and or revenue receipts issued by the commissioner of lands [if at all] confirming payment of the stand premium. Suffice it to state that in the absence of a letter of acceptance and evidence of payment of the stand premium within the circumscribed timeline, the letter of allotment [if at all same was lawful] stood extinguished. [see Joseph Kamau Muhoro v Attorney General & another [2021] KEELC 1457 (KLR); Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands) & 2 others [2014] KEHC 4946 (KLR); Dr. Syedna Mohammed Burhannuddin Saheb & 2 others vs Benja Properties & 2 others [2007] eKLR; and Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment)

44. Other than the fact that the appellant did not demonstrate the legality and validity of the impugned letter of allotment, it is also worth observing that there exists a disconnect between the letter of allotment, which was tendered and produced by the appellant and the purported part development plan. Instructively, the purported part development plan references a Nairobi number and not an Isiolo number. And same therefore does not validate the letter of allotment being relied upon by the appellant.

45. Furthermore, it is also important to underscore that even though the appellant tendered and produced[sic] minutes of the county council of Isiolo [now defunct], it is evident that the minutes under reference were neither certified nor authenticated. For good measure, the minutes under reference are public documents and hence only certified copies are admissible before a court of law. [See Section 80 of the *Evidence Act*, Chapter 80 Laws of Kenya].

46. To my mind, the minutes that were tendered and produced by the appellant in an endeavour to stake a claim to the suit property are devoid of probative value. Same cannot be deployed to underpin the appellant's claim to the suit property.

47. The Supreme Court of Kenya [the apex Court] in the case of Kenya Railways Corporation & 2 others v Okoiti & 3 others (Petition 13 & 18 (E019) of 2020 (Consolidated)) [2023] KESC 38 (KLR) (16 June 2023) (Judgment) had occasion to expound on the import and the legal implications of section 80 of the *Evidence Act*.

48. For coherence, the court stated and held thus;

> 80. The *Evidence Act* cap 80 Laws of Kenya applies to all proceedings, including constitutional petitions, save for the exceptions set out therein. Section 2 thereof provides that: Application. 1. This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's court, but not to proceedings before an arbitrator. 2. Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.
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> 81. The *Evidence Act* provides for the admissibility of evidence, with section 80 setting out the manner in which public documents may be produced in court.
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> It states: Certified copies of public documents.
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> 1. Every public officer having the custody of a public document which any person has a right to inspect shall give that person, on demand, a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.
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> 2. Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section.
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> 82. This procedure ensures the preservation of the authenticity and integrity of the public documents filed and produced in court. Further, section 81 of the *Evidence Act* allows the production of certified copies of documents in proof of the contents of the documents or parts of the documents of which they purport to be copies.
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> 83. From the foregoing provisions, public documents can only be produced in court as evidence through the procedure set out above. They can be produced as evidence in court by way of producing the original document or a copy that is duly certified. The documents having been adduced in evidence without adhering to these rather straightforward provisions were thereby outrightly rendered inadmissible.

49. Finally, I wish to state that despite the fact that the appellant herein contended that the suit property was lawfully allocated to Mohamed Gordana [now deceased], the totality of the documents that were

tendered by the appellant do not reference the suit property or at all. Moreover, it is not lost on me that the letter of allotment that was being relied upon referenced an unsurveyed commercial plot B Isiolo and no evidence of survey was ever tendered to connect [sic] the said unsurveyed plot to the suit plot herein.

50. In my humble view, it was incumbent upon the appellant to place before the trial court plausible and credible evidence to underpin his stake to the suit property. It was not enough for the appellant to just throw and brandish documents devoid of probative value and thereafter imagine that same would benefit from the jurisdiction of the court. Far from it.

51. Suffice it to underscore that courts' decisions are not founded on the basis of sympathy, empathy and or lottery of some sought. Notably, parties must tender credible evidence in the manner prescribed by section 3 of the *Evidence Act*, Chapter 80, Laws of Kenya. [See also the decision of the Court of Appeal in General & another v Hussein & 3 others (Civil Appeal 100 of 2018) [2025] KECA 1022 (KLR) (5 June 2025) (Judgment)].

52. Flowing from the foregoing, my answer to issue number two [2] is to the effect that the appellant did not place before the trial court sufficient evidence to warrant a finding in his favour. Put differently, the appellant did not discharge the onus of proof in the manner prescribed vide Sections 108 and 109 of the *Evidence Act* Chapter 80, Laws of Kenya.

53. Next is the issue as to whether the appellant's counterclaim was dealt with and determined by the learned trial magistrate. Suffice it to state that the appellant herein has complained in his Memorandum of Appeal that his counterclaim was not determined by the trial court.

54. It is instructive to note that the appellant indeed filed a counterclaim and wherein same sought a declaration pertaining to the acquisition of the suit property on the basis of adverse possession. For good measure, the appellant contended that same had been in occupation and possession of the suit property for more than thirty years. To this end, the appellant contended that same had acquired the suit property vide prescription.

55. Even though the appellant contended that same had acquired the suit property on account of adverse possession, it is not lost on me that the appellant did not tender and or produce any evidence to demonstrate[sic] occupation, possession and use of the suit property. It is not enough to make mere statements and believe that such statements, without more, would suffice.

56. Notably, the appellant herein was obligated to tender and produce evidence to prove occupation, possession and use of the suit property for the statutory duration. See [Mbira Vs. Gachuhi [2002] 1 EA; Ernest Wesonga Kweyu v Kweyu Omuto [1990] KECA 63 (KLR) and Mtana Lewa v Kahindi Ngala Mwagandi [2015] KECA 532 (KLR]).

57. Other than the fact that the appellant did not tender evidence to substantiate his claim pertaining to adverse possession, it is also important to underscore that a claim for adverse possession cannot be canvassed simultaneously with a claim for ownership of land. Simply put, the appellant cannot on one hand be laying a claim to being the lawful owner [allotee] of the suit plot and at the same time purporting to have acquired title vide adverse possession.

58. The law as pertains to whether one can claim to be the owner of the suit property and at the same time propagate a claim for adverse possession was elaborated upon in the case of Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] KECA 942 (KLR), where the Court of Appeal stated thus;

> 43. Comparatively, the Supreme Court of India in Mohan Lal –v- irza Abdul Gaffar, 1996, 1 SCC 639 faced with an inconsistent claim of title by agreement and adverse possession stated that

since the appellant admitted he came into possession of land lawfully under an agreement and continued to remain in possession till date of the suit, the plea of adverse possession was not available to the appellant. That having come into possession by agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor and that the latter had acquiesced to his illegal possession during the entire period of 12 years.

44. Persuaded by the merits of the legal principle enunciated by the India Supreme Court and which we hereby adopt, in the instant matter, the appellant cannot found his claim to possession of the suit property on a gift from his father then also assert a claim over the parcel founded on adverse possession. He either proves he had a gift or proves independently his claim for adverse possession. The appellant's claim founded on a gift fails as his father had no proprietary interest in the suit property that he could gift to the appellant in 1970.

[see also the decision of the court of Appeal in Catherine Koriko & 3 others v Evaline Rosa [2020] KECA 534 (KLR)].

59. Furthermore, it is also important to observe that the counterclaim by the appellant herein was equally not verified by the requisite verifying affidavit in accordance with the provisions of Order 7 Rule 5 as read together with Order 4 Rule 1 and 2 of the Civil Procedure Rules 2010.

60. Simply put, the appellant herein did not substantiate his claims at the foot of the counterclaim dated 6th February 2023. To this end, the learned trial magistrate was right in finding and holding that the appellant's alleged right to the land was/ is unsubstantiated.

61. To my mind, the learned trial magistrate found and held that the appellant's counterclaim was devoid of merits. It was unsubstantiated. It was thus declined.

62. Before concluding on the appeal, there is one issue which merits mention and a short discussion. The issues relate to whether the suit that was commenced against the appellant in the subordinate court was competent or otherwise.

63. The appellant herein contended that the claim by the respondent ought to have been filed against the estate of Mohamed Godana [deceased] or the duly constituted legal administrator. However, it was contended that the suit was filed against the appellant, who is not the legal administrator of the estate of Mohamed Godana [deceased].

64. My short answer to the contention beforehand is to the effect that the respondent herein impleaded and sued the appellant because the appellant was stated to have trespassed onto the suit property. Simply put, the respondent's case was to the effect that the appellant had no rights to the suit property. In this regard, the appellant was duly impleaded and sued in his personal capacity.

65. Finally, I am unable to agree with the submissions by learned counsel for the appellant that the appellant's counterclaim was not determined. Perhaps the learned trial magistrate did not deploy the usual terminology of dismissal but it is evident that the counterclaim was dismissed.

Final Disposition:

66. Flowing from the discussion contained in the body of the judgment and taking into account the principles enunciated in the case of Mwana Sokoni versus Kenya Bus Services Limited 1985 eKLR, I come to the conclusion that the appeal before hand is bereft of merit.

67. Consequently, and in the premises, the final orders that commend themselves unto me are as hereunder:

i. The Appeal be and is hereby dismissed.

ii. The Judgment and consequential decree of the learned trial magistrate dated 8th November 2024 be and is hereby affirmed.

iii. Cost of the Appeal be and are hereby awarded to the respondent.

iv. The costs in terms of clause[iii] shall be agreed upon and in default same shall be taxed by the Deputy Registrar of the court.

v. The orders of stay of execution which were issued by the subordinate court are hereby discharged.

68. It is so ordered.

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

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Mutuma/Mukami – Court Assistant.

Mr. Kaba holding brief for Mr. Maranya for the Appellant.

Mr. Lekoona for the Respondent.