



**Kasena v Katsole & 2 others (Environment and Land Appeal E034 of 2024)  
[2025] KEELC 6099 (KLR) (22 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6099 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND APPEAL E034 OF 2024  
FM NJOROGE, J  
SEPTEMBER 22, 2025**

**BETWEEN**

**MENZA KASENA ..... APPELLANT**

**AND**

**MUMBA KATSOLE ..... 1<sup>ST</sup> RESPONDENT**

**NGALA KATSOLE NGODOWE ..... 2<sup>ND</sup> RESPONDENT**

**CHARO KATSOLE NGODOWE ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Memorandum of Appeal dated 9<sup>th</sup> July 2024 has the following grounds:
  - a. That the learned trial magistrate erred in fact and in law in failing to appreciate the evidence tendered with regard to the ownership of the property and/or land known as Kaloleni/Chalani/202;
  - b. That the learned trial magistrate misdirected herself in totally disregarding the evidence by the plaintiff/appellant herein on the issue of negligence;
  - c. That the learned magistrate erred by failing to appreciate that the plaintiff/appellant herein had proved its case on a balance of probabilities which was uncontroverted by the respondents.
2. The appellant proposes that the judgment dismissing his case in the lower court and all consequential orders in Kaloleni ELC No E006 of 2024 be set aside and substituted with an order of costs made in his favour in the appeal.
3. The background to the present appeal is that the appellant filed Kaloleni ELC Case No E006 of 2022 against the respondents seeking the following orders:
  - a. A declaration that the suit piece of land known as ..... (sic) belongs to the plaintiff;



- b. A permanent injunction restraining the defendants, their assigns, agents and or any person authorized by them from trespassing into, disposing of, alienating or in any manner dealing with the plaintiff's piece of land Kaloleni/Chalani/202;
  - c. An order that the Land Registrar Kilifi to strike off the names of the defendants or their deceased father from the register and replace the same with the plaintiff's name as registered owner of the land known as Kaloleni/Chalani/202;
  - d. Costs of this suit together with interest thereon at court rates;
  - e. Any such other or further relief as this honourable court may deem appropriate.
4. In the plaint, the plaintiff claimed that at all material times, he has been the legal and/or beneficial owner of the land known as Kaloleni/Chalani/202 (herein after also called "the suit land".) He averred that the dispute between him and the respondents over the suit land had been tried by the Kaloleni Land Committee, the Appeals Tribunal Mombasa and eventually the High Court in High Court Mombasa Appeal Case No 27 of 2016. (I note that case should be properly cited as Mombasa ELC Misc Appl No 27 of 2016.)
  5. The appellant stated therein that in accordance with Giriama traditions, his mother was inherited by his paternal uncle upon his father's demise. That paternal uncle happened to be the grandfather of the respondents. He avers that he has been on the suit land for a long time, that it is his share of ancestral land. He avers that the disputed land is situate at Chanagande while the defendants' father's share is situated at Mihingoni. He added that the respondents have never resided at Chanagande at any time. However, the defendants have listed the suit property in the list of their father's properties for distribution and they have the intent of evicting him from the suit land.
  6. The respondents filed a defence and a counterclaim dated 28/11/2022. This gist of their defence is that they hold a grant of letters of administration to their late father's estate, and that they are entitled to the suit land which was registered in the name of their now deceased father on 5/7/1990, that being the first registration, and the appellant is therefore a trespasser who has failed to disclose material facts and whose hands are thus unclean; that the grant was not objected to; that on his part the appellant had lodged a citation in respect of the said estate in 2019 at Mombasa; that in that citation the appellant admitted that the respondents were the rightful heirs of the deceased; that the appellant lacks locus standi, he being not related by blood to the respondents or the deceased, their only connection being membership to the same clan; that the appellant's father and the respondents' father never had any disputes over the suit land.
  7. In the counterclaim, the respondents reiterated the matters stated in their defence and prayed for a declaration that they are the rightful heirs of the suit property by virtue of the confirmation of grant dated 27<sup>th</sup> May 2022, a declaration that the plaintiff is a trespasser and an eviction order against him.

### **Appellants' Submissions.**

8. The appellant stated that the suit land was his ancestral land; that there are kinship ties between him and the respondents as stated in the plaint; that the suit property was registered in the name of the respondent's father, who was the eldest son in the family, as was the tradition at the time of demarcation; that he has been residing and doing cultivation on the suit land and was brought up on the suit land by the respondent's father who inherited the appellant's mother after his father died; the respondent's father built his house at Mihingoni and he never built any house on the suit land; he left the land to the appellant; after dowry was paid for his aunt, it was utilized to purchase the suit land; the appellant married on the suit land and still resides on it to date; it was only after the demise



of their father that the respondents showed intent of evicting the appellant, who, if evicted, would have no other home to go to. He avers that he is the only son of his father and according to Giriama traditions, the respondent's father took over all the property of his father when he died; he avers that having resided on the suit land for over 50 years he is entitled to the land by way of adverse possession; he cited the case of Jacob Mwanto Wangora Vs Mary Waruga Wokabi & Others 2018 eKLR for that proposition. He averred that he would suffer injury since he was born and raised on the suit land which is his only home and he has nowhere else to go if evicted.

### **Respondents' Submissions.**

9. The respondent's submissions are dated 8/5/2025. The respondents state that title to the suit land emanated from the land adjudication process; that the appellant was aware of the existence of the provisions of Section 13 of the [Land Adjudication Act](#) and he never lodged any claim over the suit land; citing Speaker of the National Assembly Vs The Hon James Njenga Karume Civil Application No 92 Of 1992 and Stephen Kirimi M'Rinturi V Land Adjudication Officer Igembe District & 3 Others, Peter Kumbu Kimunya & Another (Interested Parties) 2020 eKLR, the respondents state that the [Land Adjudication Act](#) provides a self-contained framework for resolution of disputes relating to land being adjudicated under it; that thus the appellant has failed to establish any legal right to the suit land. Further, they aver that the appellant is guilty of laches, and that his rights if any were extinguished by his failure to lay any claim to the suit land during the adjudication process. They cite Section 27 of the [Land Registration Act](#) on the effect of registration of the land, and aver that the appellant never demonstrated that he had acquired the suit land under any of the methods under Section 7 of the [Land Registration Act](#). Citing Michael Macharia Mwangi V Stephen Kipsigei Soi, 2004 eKLR, they state that the appellant was merely a licensee on the land courtesy of the permission of the respondents' father; citing Kipketer Arap Marisin V Paul Kipkurui Kurgat 2005, eKLR the respondents stated that the respondent's lengthy possession of the suit land does not give him title to the suit land; they urged the court to dismiss the appeal.

### **Analysis and Determination.**

10. I have considered the grounds of appeal and the submissions of the parties in this appeal. The issue arising for determination in the present appeal is whether the learned trial magistrate erred in law and in fact by failing to appreciate the evidence tendered at the hearing regarding ownership of the suit property and thus ended up with a wrong conclusion to the effect that the appellant had not proved his case on a balance of probabilities.
11. *Selle & Another V Associated Motor Boat Company* is the locus classicus for the legal position that the appellate court on a first appeal is under a duty to consider and re-evaluate the evidence on record and draw its own conclusions.
12. Evidence was led by the respondents at the lower court, and admitted as correct by the appellant, that the suit land was registered in the name of their deceased father and registration is thus not in issue.

### **Appellant's Evidence at The Lower Court.**

13. In his testimony on 13/3/2024 the appellant stated that the respondents are his cousins; that the suit land is family land that had been purchased by one Mumba, grandfather to the 1<sup>st</sup> respondent; that his father died when he was 5 and his mother was inherited by his uncle, the respondents' father in accordance with local traditions. His stepfather then took up ownership of his late father's properties and sold the appellant's father's parcel of land and went to settle at Mihingoni with his family. However, the grandfather (Mumba) had received dowry paid for one of the appellant's aunts



and utilized it to purchase the suit land (there is a variance between the evidence he gave orally and the written statement dated 14/9/22 on this issue because the statement identifies the uncle Katsole as the one who received the dowry and that the dowry was in respect of one of the sisters of the appellant. That I however attribute to the mistake on the part of the one who recorded the statement.) The entire family used the suit land as farmland. The witness statement also states that the appellant received information from the respondents' father to the effect that the appellant was the rightful owner of the suit land since it was purchased using his sister's dowry. He then settled on the suit land and went to work far away from home, leaving the respondent's father in charge of the suit land; that he was absent from home during demarcation and it was only logical that the respondent's father's name (Katsole Mumba, the appellant's uncle) be used to register the suit land since he was the eldest in the family; Katsole Mumba however passed on without transferring the suit land in the appellant's name. After his demise the appellant took the matter before the local administration and the defendants maintained that the land was their father's and urged his eviction. A case was conducted by the Kaloleni Land Disputes Tribunal and the decision did not favour the appellant. He appealed the tribunal decision to the High Court at Mombasa and the same was determined. He stated that is now an old man in his 80s and he has no other place to go to since the suit land is the only home he knows; that the respondents have a home at Mihingoni which was established by their father and they bury their dead on that land where the home is situate; that they have never lived on the suit land.

#### **Respondents' Evidence at The Lower Court.**

14. In the lower court the respondents' evidence was that they are the biological offspring of Katsole Mumba the registered owner of the suit land who hold a grant of letters of administration to his estate; that a Citation by the appellant was proof that the appellant recognized that fact; that the appellant is not related to them by blood as his mother was inherited by the respondent's grandfather when he was a small boy. They stated that their father's is a first registration; that if it was family property as claimed by the appellant, their grandfather could have had the same registered in his name. They averred that the appellant is a trespasser on the suit land.

#### **The Lower Court Judgment.**

15. In her judgment in Kaloleni ELC No E006 of 2024, the magistrate noted that the appellant lacked any document showing that he owned the suit land. She noted that the appellant's evidence was to the effect that the respondents' father had told him to occupy the suit land.
16. In analyzing the defence evidence, the trial magistrate noted that the evidence of the respondents was that the appellant's grandfather and the respondent's grandfather were brothers.
17. She also noted that the suit title was the end product of an adjudication process, and the appellant never demonstrated any steps that he took to correct the Adjudication Register in accordance with the provisions of the *Land Adjudication Act*; that the appellant did not satisfy any of the methods of land acquisition set out in Section 7 of the *Land Registration Act*. She also observed that there was no objection by the appellant to the issuance of a grant of letters of administration to the respondents; that the appellant had not established any of the grounds in Section 26 of the *Land Registration Act* by virtue of which a title could be nullified; that no fraud had been pleaded to entitle the appellant to rectification under Section 80 LRA. She therefore granted the prayers in the respondents' counterclaim save for the parties' own costs which were to be borne by each party.



18. Registration of title in a person's name is a matter of great consequence as seen from Section 25 and 26 of the Land Registration Act. Those provisions are set out herein below as follows:

- “25. 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—
- (1) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (a) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26.

- (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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

19. What the appellant sought before the lower court was nullification of title in the name of Katsole Mumba. In view of the indefeasibility of title envisaged by Section 25, for it to be successful, his challenge to Katsole Mumba's title had to establish fraud or misrepresentation in the acquisition of the suit title to which Katsole Mumba is proved to have been a party, or that the title has been acquired illegally or unprocedurally or through a corrupt scheme.

20. None of the grounds for nullification in Section 26(1) (a) and (b) were claimed in the plaint dated 15<sup>th</sup> September 2022 or established by the appellant at the hearing and his evidence leaned towards a trust.

21. The claim that it was not the respondents' father but the respondent's grandfather who purchased the land is clearly reflected in the tribunal proceedings that culminated in the Mombasa ELC MISC APPL No 27 Of 2016, the latter proceeding which nullified the Tribunal award on the basis that the



tribunal lacked jurisdiction. After that the appellant lodged the Suit No Kaloleni ELC No E006 of 2024. Judgment was passed against him and he therefore lodged the present appeal.

22. Justice Munyao captured the facts in his judgment in Mombasa ELC MISC APPL No 27 Of 2016. The real state of affairs that I distil from the various available sources is this:

- a. The grandfathers of the disputants herein, Menza and Mumba, were brothers and so their fathers were cousins and finally the disputants themselves are therefore related as cousins. (There is therefore no merit in the claim by the respondents and indeed it is quite misleading when they deny any blood relationship with the appellant in their pleading;)
- b. Menza bore the appellant's father Kasena; Mumba bore the respondent's father Katsole;
- c. The grandfather of the appellant died and his widow was inherited by the respondent's grandfather Mumba. He took over Menza's children and properties;
- d. The suit land was purchased from one Mr Bakoko by Mumba, the respondent's grandfather using dowry paid for one of Menza's daughters called Nyevu who was the Appellant's aunt.
- e. By the time Nyevu got married, Menza had already died, so it was Mumba who was in full control of the family affairs;
- f. The suit land was not therefore purchased by Katsole Mumba or using his resources; neither was it purchased using the respondents' grandfather's resources and therefore it did not from inception belong to him or his descendants but to the lineage of Menza whose daughter's dowry had been applied in its purchase;
- g. It is credible that Katsole was registered as owner simply because he was the eldest then and Menza and the appellant's father were deceased and the appellant was away;
- h. It is also credible that Katsole went and purchased other land at Mihindani and settled there because he appreciated that the suit land was not his neither did he have a share in it;
  - i. Neither Katsole nor his children ever occupied or developed the suit land;
- j. Katsole therefore clearly held the land in trust for the appellant or his family;
- k. The children of Katsole are the ones who obtained title in the name of their father after he died;
- l. Failure of the appellant to obtain a grant in respect of Katsole's estate did not have a bearing on whether he was entitled to the land held in trust by Katsole; his Citation was only intended to make things move so that he could process the title in his name once the trust was dissolved;



- m. The children of Mumba (Katsole included) and the children of Katsole (the respondents included) were therefore not entitled to the suit land from inception because it belonged to the lineage of Menza and not Mumba.
23. It is worthy of note that the appellant called two witnesses before the Land Disputes Tribunal. Their accounts seemed to match in various respects. Though the tribunal proceedings were nullified by Munyao J in Mombasa ELC Misc Appl No 27 of 2016, that evidence contained in the Tribunal proceedings is credible since it was sworn evidence given first hand by witnesses who appeared before that tribunal. I am inclined to believe it. Evidence of trust having been given, and the record of the Tribunal having been placed before the trial magistrate, she ought to have considered the same in her judgment and it would have enabled her to arrive at the conclusion that Katsole Mumba was holding the land in trust, and that granting him or his descendants the land absolutely would not only result in disinheritance of the appellant, but also to unjust enrichment of Katsole's family which is a serious affront to justice.
24. I therefore find that in the face of all this evidence that points to the fact that the land was held by Katsole Mumba in trust for the appellant's family, the trial magistrate erred in her dismissal of the appellant's claim. I therefore find that the decision made by the trial magistrate R. Amwayi dated 10<sup>th</sup> July 2024 must be set aside. The consequence of the foregoing is that the present appeal succeeds. In conclusion, I therefore issue the following final orders:
- a. The judgment of R. Amwayi dated 10<sup>th</sup> July 2024 in Kaloleni SPMCC ELC E006 OF 2022 and all consequential orders are hereby set aside and are substituted with an order allowing the appellant's claim as prayed in prayer nos (a), (b), and (c) of the plaint dated 15<sup>th</sup> September 2022 in that suit;
  - b. The relevant Land Registrar holding the land records in the land registry under his administration shall therefore rectify the land register with respect to Kaloleni/Chalani/202 by expunging registration in the name of Katsole Mumba and in lieu thereof register Menza Kasena, the appellant herein as proprietor thereof;
  - c. As the parties are related by blood, which is contrary to the assertions of the respondents, I find it necessary to order, and I hereby do order, for the sake of preserving some sort of amity between the parties in this case, that each party shall bear their own costs of the appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2025.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI.**

