



REPUBLIC OF KENYA



KENYA LAW
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**Masai v Masai & another (Environment and Land Appeal E004 of 2023)
[2025] KEELC 6049 (KLR) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6049 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E004 OF 2023
EO OBAGA, J
SEPTEMBER 18, 2025**

BETWEEN

MUTUNGI MASAI APPELLANT

AND

ROSE WAYUA MASAI 1ST RESPONDENT

**GOSPEL TABERNACLE CHURCH OF KENYA (SUED THROUGH ITS
TRUSTEES) 2ND RESPONDENT**

*(Being an appeal from the judgment of Hon. F. Makoyo Principal
Magistrate dated 11th August, 2023 in Kilungu MCELC No. E005 of 2021)*

JUDGMENT

1. The Appeal herein results from a claim filed by the Appellant in Kilungu Principal Magistrate's court in ELC case No. E005 of 2021 in which he sought the following reliefs:
 - a. That a permanent injunction restraining the Defendants, their servants, agents and/or whom whatsoever from entering and trespassing onto plot number 625 Kiou Adjudication Section otherwise known as land parcel No. Makueni/Kiou/652.
 - b. That a declaration that land parcel number Makuei/Kiou/652 belongs to the entire family of the late Masai Musomba.
 - c. That a declaration that the transfer/registration of land parcel number Makueni/Kiou/652 in the name of Tabernacle Church of Kenya was irregular and/or illegal.
 - d. That a declaration the 2nd Defendant is illegally occupying land parcel number Makueni/Kiou/652.



- e. That a permanent order directing the Makueni County Land Registrar to rectify the title to land parcel number Makueni/Kiou/652 by cancelling the name of the 2nd Defendant and in its place the name of the Plaintiff to be entered to hold for themselves and on behalf of the entire family of the late Masai musomba.
 - f. That an eviction order be issued against the 2nd Defendant in person, their agents, servants and/or whosoever claims from them from land parcel number Makueni/Kiou/652.
 - g. Costs and interest of the suit.
2. The Respondent filed a defence and raised a counterclaim in which the following reliefs were sought:
 - a. That a declaration that the 2nd Defendant Gospel Tabernacle Church Kenya is the proprietor of land parcel number Makueni/Kiou/625.
 - b. That a permanent injunction restraining the Plaintiff, his servants, agents and/or whom whatsoever from interfering with the 2nd Defendant's use of land parcel number Makueni/Kiou/625.
 - c. Costs of the suit.
 3. The Appellant is a step son of the 1st Respondent who has since passed on and the appeal against her was withdrawn on 5th May, 2025 pursuant to a notice of withdrawal dated 23rd April, 2025 though the appeal against her had abated. The Appellant is son to Masai Musomba who died in 1996 (deceased). The deceased had two wives. The 1st wife was Minoos Masai and was mother to the Appellant. The second wife was Rose Wayua Masai the 1st Respondent herein.
 4. The deceased owned among other properties LR No. Makueni Kiou/625 (suit property). As at the time of the death of the deceased, the suit property had not been registered in his name. What however emerges from the evidence on record is that the suit property had been given to the 1st Respondent who proceeded to have the same registered in her name on 11th April, 2011 and later sold it to the 2nd Respondent who obtained title on 10th January, 2012 the same having been registered in its name on 2nd November, 2011.
 5. After the conclusion of the hearing, the trial magistrate dismissed the Appellant's case and found in favour of the 2nd Respondent in the counterclaim. This is what triggered this appeal in which the Appellant raised the following grounds of appeal.
 1. The learned Principal Magistrate erred in law by failing to allow the Appellant's orders despite the fact that the same were prayed in the plaint therein.
 2. The learned Principal Magistrate erred in law by failing to consider the contradicting evidence produced by the 1st Respondent's DW1 in that the alleged land in issue was ancestral land.
 3. The learned Principal Magistrate erred in law and misdirected himself on the facts by entering judgment against the appellant by failing to consider that the 2nd Respondent was not a family member and had no rights to purchase and transfer the land parcel number Makueni/Kiou/652 into their names without involving the entire family of the late Masai Musomba.
 4. The learned Principal Magistrate erred in law and fact by failing to consider that the 2nd Respondent was intermeddling with a deceased's property which amounts to six month's imprisonment.



5. The learned Principal Magistrate erred in law by failing to consider and in fact by making judgment in favour of the Respondents when there was no binding agreement for any sale of land parcel No. Makueni/Kiou/652.
6. The judgment of the learned Principal Magistrate is against the weight of the evidence in record contrary to the law and travesty of Justice.
6. The Appeal herein was disposed of by way of written submissions. The Appellant filed his submissions dated 9th January, 2025. The 2nd Respondent filed submissions dated 28th January, 2025. It is important to note that in the pleadings before the lower court and in this appeal, the Appellant erroneously describes the suit property as Makueni/Kiou/652 instead of Makueni/Kiou/625.
7. The Appellant submitted that the suit property fell under Kiou Adjudication Section and that therefore no title should have been issued before the process of adjudication was completed. It was submitted that as the process of adjudication had not been completed, the certificate issued to the 1st Respondent had nothing lawful to pass on the suit property to the 2nd Respondent.
8. The Appellant further submitted that the suit property belonged to the deceased and that the clan had no business in distributing the property of the deceased. The Appellant relied on the case of *In Re Estate of Nzioka Muathi (Deceased) (2021) eKLR* where Justice Odunga (as he then was) stated that a clan cannot distribute the property of a deceased person and therefore any distribution made by the clan is null and void ab initio.
9. The second Respondent submitted that the Appellant did not prove any fraud against it. The suit property was registered in the name of the 1st Respondent who lawfully transferred it to it. There is therefore no way the 2nd Respondent can be accused of intermeddling with the Estate of the deceased. The 2nd Respondent further submitted that at the trial, the Appellant claimed that the suit property had been given to him as a gift but in this appeal, he claims that the same belonged to the deceased.
10. The 2nd Respondent further submitted that the Appellant was raising the issue of the adjudication process on appeal as that issue was never raised in the lower court and cannot therefore be accepted on appeal.
11. I have carefully gone through the record of appeal, and considered the grounds of appeal thereof in light of the evidence adduced before the trial court. My duty as the 1st Appellate court was succinctly stated in the case of *Selle & Another –vs- Associated Motor Boat Company & Others (1968) EA 123* as follows:

“.....is to reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..... In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears 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 on the case generally”.
12. The issues which emerge for determination are firstly whether the acquisition of title by the 1st Respondent was fraudulent. Secondly whether the 1st Respondent lawfully sold the suit property to the 2nd Respondent. Thirdly, whether the 2nd Respondent was under obligation to consult the family of the deceased before purchase of the suit property. Fourthly, whether the suit before the lower court was based on the provisions of the *Land Adjudication Act*. Fifthly, was it necessary to carry out the



process of succession for the Estate of the deceased before acquisition of title by the 1st Respondent. Sixthly, is the 2nd Respondent entitled to the reliefs in the counterclaim. Lastly which order should be made on costs.

13. On the first issue, the trial magistrate found that the Appellant had not proved fraud on the part of the Respondents. In the case of *Vijay Morjaria –vs- Nansingh Madhusing Darbar & Another* (2000) eKLR, it was stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”.

14. The trial magistrate considered the evidence of the Appellant’s witnesses and found that no fraud had been established. The third witness of the Appellant denounced the witness statement which had been attributed to him. The statement was actually drawn by the Appellant and was not signed by the witness. went on to state that as far as he was concerned, the suit property belonged to the 1st Respondent the same having been given to her by the deceased who had two wives and had given each wife her share.
15. The evidence which was adduced is that the Appellant was aggressive and had no respect for the 1st Respondent. The clan had to intervene and settled the sharing of the deceased’s land. The 1st Respondent was given the suit property and one other parcel where she put up a house which was demolished by the Appellant. The 1st Respondent being apprehensive of her safety decided to sell the suit property to the 2nd Respondent and went and purchased land at Kajiado where she resided until her demise. As at the time the 1st Respondent was selling the suit property to the 2nd Respondent, the same was in her name. The Adjudication process had gone too far. The suit property had been properly recorded in the 1st Respondent’s name and as the Appellant had not made any complaint as provided under the *Land Adjudication Act*, the Land Adjudication and settlement officer vide his letter of 1st April, 2008 observed that the Appellant’s complaint had been overtaken by events and that his complaint could only be addressed by clan members or a court of law.
16. In a letter dated 19th February, 2007, the District Land Adjudication Officer had confirmed that the suit property and another parcel were recorded in the name of the 1st Respondent. This being the case, the 1st Respondent had the liberty to process title as the Appellant had not moved to utilize the mechanisms provided under the *Land Adjudication Act*. To this extent, there was no fraud on the part of the 1st Respondent. The trial Magistrate cannot therefore be faulted for finding that the Appellant had not proved any fraud on the part of the 1st Respondent or the 2nd Respondent.
17. On the second issue, the evidence is clear that the deceased died before the Adjudication process begun. As at the time the adjudication process begun, the Adjudication Officer found that the suit property belonged to the 1st Respondent in whose favour it was recorded. As the Appellant had not lodged any complaint in the manner provided for under the *Land Adjudication Act*, the 1st Respondent’s name was forwarded to the Land Registrar who proceeded to issue a title in her favour. The 1st Respondent then lawfully sold the suit property to the 2nd Respondent and therefore the 2nd Respondent could not be accused of intermeddling with the Estate of the deceased.



18. On the third issue, as the evidence showed that the 1st Respondent had title to the suit property. The officials of the 2nd Respondent were under no obligation to consult the larger family of the deceased who included the Appellant on whether to purchase the suit property or not.
19. On the fourth issue, it is clear that the suit before the lower court was not based on the provisions of the Land Adjudication Act. This is clear from the letter of the Land Adjudication and Settlement Officer dated 1st April, 2008 which observed that the Appellant had made his complaint too late in the day as the adjudication process had gone too far and titles were in the process of being issued. The Appellant was advised to seek recourse either through the clan or a court of law. This is how he ended up filing the suit which is the subject of this appeal. The Appellant's submissions that the process under the Adjudication Act was not exhausted amounts to raising a new issue which was not before the trial court.
20. On the fifth issue, the circumstances of this case show that Kiou was an adjudication section. As the owner of the suit property was deceased, the adjudication officers were only obliged to record interest in land in favour of anyone who showed that he or she was entitled to be recorded in the register. There had been disputes which touched on the suit property which disputes were settled in favour of the 1st Respondent. This being the case and given that the suit property had not been recorded in the deceased's name, there was no need for succession proceedings. It is common knowledge that when Land Adjudication commenced in Kenya, the original owners of the lands had long passed away. It will be absurd for one to claim that before the interests in those lands could be recorded there had to be succession proceedings.
21. The Appellant is blowing both hot and cold. As the first born of the house of her mother Mino Masai who died before the process of adjudication, he was a beneficiary of plots belonging to the deceased, yet the issue of succession on his part was not an issue. The Appellant is a person who was out to disinherit the 1st Respondent at any cost. This is why he demolished the house which the 1st Respondent had put up in another parcel which is not subject of this appeal and forcefully used the suit property until it was sold to the 2nd Respondent.
22. On the sixth issue it goes without saying that the 2nd Respondent is entitled to the reliefs in the counterclaim. It has been found that the sale to the 2nd Respondent was lawful. The 2nd Respondent is entitled to the protection of what lawfully belongs to it. I therefore find no merit in this appeal which is dismissed with costs to the 2nd Respondent. The 2nd Respondent shall also have costs of the suit in the lower court.

.....
HON. E. O. OBAGA

JUDGE

JUDGMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 18TH DAY OF SEPTEMBER, 2025.

In The Presence Of:

Ms. Nzilani for Respondent.

Ms. Mboya for Appellant.

Court assistant – Steve Musyoki

