Musa & 5 others v Muyonga (Environment and Land Appeal E003 of 2025) [2025] KEELC 6537 (KLR) (25 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6537 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ENVIRONMENT AND LAND APPEAL E003 OF 2025

A NYUKURI, J

SEPTEMBER 25, 2025

BETWEEN

CHARLES SHIKUKU MUSA ..... 1ST APPELLANT

TABITHA OPETE & 4 OTHERS & 4 OTHERS & 4 OTHERS & 4 OTHERS ..... 2ND APPELLANT

AND

WILSON MUYONGA ..... RESPONDENT

JUDGMENT

Introduction

1. This appeal was filed by Charles Shikuku & 5 others against Wilson Muyonga, challenging the judgement of Honourable J.J. Masiga (PM) delivered on 3rd January 2025 in Kakamega MCL & E No. E225 of 2024. In the impugned judgment, the trial court allowed the plaintiff's claim, declaring that the plaintiff was the sole owner of the parcel of land known as Butsotso/Ingotse/688 and that the 1st defendant and the late Opete Musa Maina are entitled to land parcel Nos. Butsotso/Ingotse/1681 and 1680 respectively. The court further held that the remains of one Opete Musa Maina are supposed to be buried on parcel No. Butsotso/Ingotse/1680 and granted an order of eviction against the defendants from parcel No. Butsotso/Ingotse/688 and injuncted them from trespassing on that parcel. The defendants' counterclaim was dismissed.

Background

2. In a plaint dated 14th November 2024 the plaintiff sought against the defendants the following orders;

    a. A declaration that the plaintiff is the sole owner of land parcel No. Butsotso/Ingotse/ 688 while the defendants are entitled to land parcel No. Butsotso/Ingotse/ 608 or its subdivisions

1680 and 1681 being parcels of land inherited by the plaintiff and the 1st defendant's father respectively.

b. A declaration that Musa Opete's remains are supposed to be buried on land parcel No. 608 or 1680 one of its subdivisions.

c. An eviction of the defendants jointly and severally from land parcel No. Butsotso/ Ingotse/688 as they own land parcel Butsotso/Ingotse/1680 and 1681 originally No. Butsotso/Ingotse/608.

d. A permanent injunction restraining the defendants jointly and severely from ever trespassing onto land parcel Butsotso/Ingotse/ 688.

e. costs of the suit

3. The plaintiff is the registered proprietor of the parcel of land known as Butsotso/Ingotse/688 (suit property). The plaintiff and the 1st defendant are half brothers as they share a mother. The facts of the case herein are that one Muyonga Mukangai alias Muyonga Tunga (hereinafter referred to as Muyonga) was married to two wives, namely Salano and Esther. Several children were born to Salano, among them, Musa Maina Muyonga, (Hereinafter referred to as Musa) the father of the Charles Sikuku and the late Opete Musa Maina (hereinafater referred to as Opete). The plaintiff was borne from the union between Esther and Muyonga. Thereafter, Muyonga Mukangai passed on. Subsequently, Musa being an elder son of Muyonga inherited his father's junior wife Esther and they were blessed with Charles Shikuku (1st defendant) and Opete (deceased husband to the 2nd defendant) among other children. Salano's house was living on parcel No. Butsotso/Ingotse/608 while Esther's house was on parcel No. Butsotso/Ingotse/688. Before inheriting Esther, Musa had his wife and children on parcel No. Butsotso/Ingotse/608. Musa lived with Esther and the children he had with her on parcel No. Butsotso/Ingotse/688. Esther's Children with Musa grew up, got married and put up homes on the suit property. All was well until Opete died on 5th October 2024, that is when Wilson filed the suit before the lower court seeking to halt the burial of Opete on the suit property. He also sought a declaration that the suit property belonged to him among other prayers. His position is that under his clan (Batsotso) traditions, the appellants were expected to vacate the suit property and move to parcel No. 608 which belonged to Musa.

4. The plaintiff stated that his late father, Muyonga allocated the the 1st defendant's father (Musa) the parcel of land known as Butsotso/Ingotse/608 while he was allocated parcel Butsotso/Ingotse/688. He maintained that by custom, the 1st defendant and the late Opete were expected to return to their father's land as his children and leave the suit property although they grew up thereon being sons of the plaintiff's mother and have settled on a portion thereof. He also stated that the 1st defendant's siblings from their first house sold the parcel No. Butsotso/Ingotse/608 and settled on another parcel that they purchased. He stated that he redeemed that parcel and subdivided it into parcel No. 1680 which is registered in the name of the late Opete while parcel No. 1681 is registered in the name of the 1st defendant. According to him, their clan resolved that the 1st defendant and the late Opete together with their families were by tradition supposed to move to their father's land parcel No. Butsotso/ Ingotse/608 because that was their inheritance but that the 1st defendant and the deceased had refused and neglected to abide by tradition which expects them to inherit their father's land. He maintained that the occupation by the defendants of the suit property was by consent and that no prescriptive rights and or adverse possession can accrue to them.

5. In a defence and counterclaim dated 10th December 2024, the 1st to 6th defendants denied the plaintiff's claim. They averred that the plaintiff was registered as proprietor of the suit property in trust for the

defendants jointly and severally. They stated that they have grown and settled on the suit property for a period of more than 30 years and had acquired the same by adverse possession. They alleged not to be aware of any meeting by the clan and stated that if the same was held, it was against the law.

6. They argued that the plaintiff's claim was time barred under the *Limitation of Actions Act* having been filed after a period of 12 years. They also stated that the suit was sub judice as there was another suit being Kakamega MCL&E No. E144 of 2024.

7. They stated that the registrations of the two sons from each house was for purposes of holding the land in trust for their mothers and their siblings. That in 1974 Musa the father of the 1st defendant purchased land for his sons Opete and Charles which transaction was conducted by the plaintiff on behalf of his brother Musa. They averred Musa gave the plaintiff two cows for purchase of the land from one Charles Keya Otsiambo in 1974. That as the plaintiff was the most trusted and the only learned person in the family was the one who kept the sale agreement. That the relationship between the seller of the land and Opete was strained constraining Opete to return to parcel Butsotso/Ingotse/ 688. That therefore the plaintiff was forced to recover their money from Charles so that he can buy another parcel of land for Opete and Charles but failed to do so forcing the defendants to stay on the suit property.

8. According to them, the plaintiff gave to each of them one acre of land with a promise that he will purchase the remainder which he never did. That the two brothers Opete and Charles have settled on the suit property which is properly demarcated for over 40 years and that they have since acquired an interest of adverse possession to land measuring 2 acres, one acre for of them. They insisted that they had acquired the land by adverse possession because they had been in actual continuous possession of the land for over 30 years exclusively without the consent of the owner and that neighbours and other people have known that they have been in open and notorious possession and have constructed their homes on a portion measuring 2 acres demarcated on the ground.

9. Further that theyplaintiff being the most learned and trusted person in the family was given responsibility of handling family matters as he was the leader of the family. That the plaintiff having failed to purchase another parcel of land for the 1st defendant and the late Opete and having allowed them to occupy and use a portion measuring 2 acres, he was therefore holding the suit property in trust for the defendants.

10. In the counterclaim the defendants sought the following orders;

    a. That the plaintiff suit be dismissed

    b. A declaration that the plaintiff holds in trust a portion of land measuring 2 acres out of parcel Butsotso/Ingotse/ 688

    c. In the alternative a declaration that the defendants herein have acquired by way of adverse possession a portion measuring 2 acres out of the parcel of land known as Butsotso/Ingotse/ 688.

    d. An order that the plaintiff transfers a portion of land measuring 2 acres to the defendants as occupied and utilised on the ground.

    e. In the alternative to prayer 4 above, the court directs the Deputy Registrar to sign transfer forms for the transfer of a portion of land measuring 2 acres to the defendants herein as occupied on the ground.

    f. Costs of the suit be provided for.

11. The suit was heard by way of oral evidence. There plaintiff presented two witnesses while the defendant presented three witnesses.

Plaintiff's evidence

12. PW 1 was Wilson Atsenje Muyonga, the plaintiff. He adopted his statement dated 10th December 2024 as his evidence in chief. It was his evidence that Muyonga was his father his while his elder step brother Musa inherited his mother who was still young when his father died and that they two were blessed with the 1st defendant and the late Opete. He stated that his father died before adjudication and that upon adjudication, he was registered as owner of the suit property while Musa was registered as owner of parcel No. Butsotso/Ingotse/ 608. That before inheriting the plantiff's mother, Musa had another family which was in occupation of parcel No. B utsotso/Ingotse/608 and that his brother died in 1991 and was buried on parcel Butsotso/Ingotse/ 608.

13. That Musa's sons from his 1st family sold parcel Butsotso/Ingotse/608 and relocated to a place called Kambi ya Mwanza. That they 1st defendant and the late Opete were allocated parcel No. Butsotso/ Ingotse/608 by their late father. That on learning that Musa's 1st family had sold parcel No. Butsotso/ Ingotse/ 608, he filed suit and was able to recover the land. That he subdivided parcel No. Butsotso/ Ingotse/ 608 into parcels 1680 and 1681 respectively which he gave to the 1st defendant and the late Opete.

14. That the 1st defendant and the late Opete were allowed to stay on the suit property by virtue of being his mother's sons and that having occupied the suit property by consent, they are not entitled to the same under the doctrine of adverse possession. Further that as they have their father's share, they have no claim over the suit property.

15. On cross examination, he confirmed that they were children of the same mother but different fathers. He stated that parcel he purchased the suit property. He also stated that he inherited the suit property from his father Muyonga. Further that he was born on the suit property. He confirmed that the defendants have built homes on the suit property having been born thereon.

16. According to him, his father having already died, it was the elders who showed him where to build his house and that is he was the one who showed the 1st defendant and the late Opete where to build, which was in the 1970s as he was preparing to move them to their own parcels. He stated that he did not object to them building homes on the suit property because they were living with their mother and that they were both living on half acre of land each. That the defendants had had burried their deceased members on the suit property. That the 1st defendant and late Opete were both married with children and lived on the suit property.

17. The witness informed court that he could not remove the defendants from the suit property because he wanted to follow the law. That he had conducted succession in regard to parcel Butsotso/Ingotse/608. That this land had been secretely sold by Henry and Philip the sons of Musa sbut that the same was recovered. That parcel No. 1618 is 0.49 hectares while parcel 1681 is 0.49 hectares.

18. PW 2 was Josephat Kombo Keya a former Assistant area Chief now retired. He adopted his evidence in the witness statement dated 10th December 20 24. According to him Musa inherited his step mother after the death of their father and that the mother was staying on the land that belonged to the plaintiff which had been given to him by his late father. That Muyonga died before adjudication having had parcel Nos. Butsotso/Ingotse/ 608 and 688. That the two families stay on 688 because Musa inherited the plaintiff's mother and that the 1st defendant and Opete live on the suit property where they have also raised their families but that traditionally, they are expected to return to their father's land parcel

No. Butsotso/Ingotse/ 608. He stated that the defendants stay on the suit property by virtue of their mother. That Musa's 1st family moved from parcel Butsotso/Ingotse/608 upon selling it to third parties. That Musa had earlier asked him to subdivide parcel No. Butsotso/Ingotse/ 608 into the two parcels for the benefit of his two families and that together with the elders he planted a boundary separating the two portions. That the defendants did not immediately vacate the suit property as their mother was still alive.

19. He started that traditionally when a person inherits a wife and is blessed with sons, he has to move them away and provide for them an alternative parcel because they cannot benefit from the land where he got the wife. He alleged that the plaintiff reclaimed parcel No. Butsotso/Ingotse/608 after it had been sold and that he was a witness in that case. That thedefendants should be grateful to the plaintiff for that and that the plaintiff was the only one entitled to the suit property because the defendants were living on the land by virtue of being born thereon but they cannot inherit the land as the plaintiff is not their father.

20. It was his further testimony that as the defendants had their portions in parcel No. Butsotso/ Ingotse/608, there was no reason for them to claim the suit property and that it would be unjust for the defendants to benefit twice from the same estate.

21. On cross examination, he stated the defendants were born on the suit property where they grew up and build their homes and got married. He stated that he did not know who showed them where to build their homes and that there are no boundaries on the suit property. He stated that he did not know if the plaintiff gave the defendants land. That traditionally Charles and the late Opete ought to have gone to their father's land and were supposed to have left immediately. That when they got married they were asked to leave but they refused because they were supposed to have left immediately upon getting married and or on attaining the age of majority but they continued living on the land even after attaining the age of majorityT the witness further stated that in 1988 he fixed bounderies on parcel Nos. 1680 and 1681 and that parcel No. Butsotso/Ingotse/1681 was given to Charles after the succession of their father's estate. That marked the close of the plaintiff's case.

Defendants' evidence

22. DW1 was Charles Shikuku Musa, the 1st defendant who adopted his witness statement dated 10th December 2024 at his evidence in chief. According to him, his father Musa inherited the plaintiff's mother called Esther the widow of Muyonga and the union resulted in four children among them himself, the late Opete and his two sisters. That his grand father had two wives Solano and Esther. He started that Muyonga was both his grand father and his father because he is the son of Esther, Muyonga's wife. That Musa was from the firts house of Muyonga while the plaintiff was from the second house. That Muyonga having had two houses shared his parcels Butsotso/Ingotse/ 608 to the 1st house and parcel Butsotso/Ingotse/ 688 to the 2nd house. He stated that for purposes of inheritance, Opete and himself are now children of the second house that is the House of Esther and therefore if the matter was for inheritance their inheritance would be in regard to parcel Butsotso/Ingotse/ 688.

23. This witness further stated that Musa had another wife before he inherited Esther and his wife was called Irene with whom he had several children including. According to him it is these children form Musa's first house who are entitled to share in parcel Butsotso/Ingotse/608 and that they are the ones using it at the moment. That his father Musa, through the plaintiff purchased a parcel of land for the two of them whereof he paid two heads of cattle. That the plaintiff initially settled on the land but due to a strained relationship with the vendor they had to leave. That the plaintiff sold the land to a third party with a promise that the proceeds of the sale would be applied in the purchase another parcel of land for the witness and the late Opete. He stated that the plaintiff was the one who was learned and

trusted in their family by that time. That apparently the plaintiff misappropriated the proceeds of sale but agreed to compensate them by giving each of them one hectare of land which was well demarcated . That the village elders and their father was present when the plaintiff showed the defendants their portions. That they have since utilized their said portions, established their homes and developed the same portions by planting different trees and that they have even buried several of their relatives on the land. That they had lived on and utilized the land for over 40 years without any disruption from the plaintiff and that the plaintiff was insincere and misleading the court and that his suit should be dismissed.

24. On cross examination, he stated that parcel No. Butsotso/Ingotse/608 belonged to his father and that in the succession they inherited parcel No. Butsotso/Ingotse/ 608 where he got 0.6 acres while or Opete got a similar portion. He stated that they were not using that land and that they live on parcel No. Butsotso/Ingotse/ 688. That Wilson allowed them to live on that parcel and were wondering why he wants them evicted. That they have never had a case over that land and they have never sued him over the land but the elder who came to subdivide parcel No. Butsotso/Ingotse/688 was called by the plaintiff.

25. DW 2 was Alaka Nyende. He adopted his witness statement dated 10th December 2024 as his evidence in chief. He stated that the 1st defendant and the late Opete are his brothers in their clan called a Batsotso. That Musa had two sons; Opete and the 1st defendant. That Musa asked the plaintiff to buy land for his two sons on his behalf whereof Musa paid two heads of cattle. That a village elder and another elder were witnesses to the purchase, while he was the secretary and that they wrote a sale agreement for the land. That Musa gave the agreement to the plaintiff. That the vendor had a strained relationship with Opete which forced the latter to leave the land. That the plaintiff promised to get an alternative land but which was not done and therefore he settled the defendants on the suit property as he had misappropriated the proceeds of sale. The witness stated that he was present when the plaintiff called elders to show the portion he was giving to the 1st defendant and the late Opete in 1983. That they planted beacons and that since that time Opete had been on the land until his death and that the 1st defendant lives on the land without any issues.

26. In cross examination he stated that he was born in 1945 and that he is from the same family with the parties in the suit. That in 1973 he could write and that he wrote the sale agreement between Charles Otsiambo and the plaintiff and that the consideration was for four acres of land. On being shown an agreement written by the plaintiff, he denied the handwriting on the agreement of 22nd September 1973 and stated that he wrote his agreement in Luhya, Butsotso language. He stated that he had never reported anywhere that his signature was forged. He insisted that when the agreement was written Musa. was present

27. DW3 was Habil Wandere Elijah Makokha. He adopted his witness statement dated 10th December 2024 as his evidence in chief. It was his testimony that he a neighbour to the parties herein and had known them since they were born, for over a period of 50 years. That the plaintiff, the 1st defendant and the family of the late Opete stay on the suit property and that he is aware that in 1983 the plaintiff called five clan elders being including himself for a meeting at his home and informed then that the purpose of the meeting was to share the suit property with his step brothers.

28. That they went to the suit property and they measured 35 metres by 95 meters for Opete and made similar measurements for the 1st defendant. That they planted beacons using local plants known as tsibubu and Eshikhoni and that the three families lived on the land peacefully without any issues. That he has seen them raise their families on the suit property without any problems.

29. On cross examination, he stated that that he was both a neighbour and friend of the parties herein and that he was born in 1947. That parcel No. Butsotso/Ingotse/688 belongs to plaintiff and he has owned it since he was born but Musa had his own parcel known as Butsotso/Ingotse/608. That he does not know who uses that land. That he used to work in the municipality. That marked the close of the defense case.

30. Upon consideration of the pleadings, evidence and submissions the trial court in its judgment of 3rd January 2025 dismissed the defendants' counterclaim and allowed the plaintiff's claim as prayed.

31. Aggrieved by the decision of the trial court, the appellants herein wno were defendants in the lower court, challenged the judgment of the trial court by a Memorandum of Appeal dated 13th January 2025 citing six grounds of appeal as follows;

    a. The learned trial magistrate erred in law by holding that the respondent's case has been filed within time and was not statute barred.

    b. The learned trial magistrate erred in fact by holding that the respondent herein was the sole registered owner of the suit land Butsotso/ Ingotse/688 with no any overriding interests thereon.

    c. The learned trial magistrate erred in law by holding that the respondent was not holding a portion of the land occupied by the appellants in trust.

    d. The learned magistrate erred in law by relying on evidence which was not proven on a balance of probability.

    e. The learned trial magistrate erred in law by awarding costs in a matter involving family members.

    f. The learned magistrate grossly erred in law by considering issues not raised by the respondent in his pleadings.

32. consequently the appellants sought the following orders;

    a. The honorable court does set aside judgement delivered by Hon. J.J. Masiga PM on 3rd day of January 2025 in kakamega MCL&E No. E 225 of 2024.

    b. The court enters judgment for the appellants as per their counterclaim filed by the appellant in Kakamega MCL& E No. E 225 of 2024

    c. Costs of the appeal be awarded to the appellants

33. This appeal was disposed by way of written submissions. On record are the appellants' submissions dated 24th March 2025 and the respondent's submissions dated 8th April 2023.

Appellants' submissions

34. Counsel for the appellants relied on the case of Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123 for the proposition that on a first appeal, the court must reconsider the evidence and draw its own conclusions bearing in mind that it did not hear or see witnesses and make do allowance in that respect. On whether the suit was time barred by dint of Section 7 of the *Limitation of Actions Act*, counsel argued that the trial court was wrong in holding that time started running when the title deeds for parcel No. Butsotso/Ingotse/1680 and 1681 were registered in the names of the 1st appellant and the late Opete, being 27th May 2022 on the basis that previously, the appellants had

no place to stay at the time when their mother passed on and that the respondent was the one who helped them acquire the title deeds belonging to their late father. Counsel submitted that they faulted the court's reasoning for the reason that the 1st and 2nd appellants took possession of the suit property in 1983, got married and established their homesteads and got children while on the suit property. Further that the respondent did not prove that he recovered the two parcel Nos 1680 and 1681 from a third party.

35. It was also contended for the appellants that when the appellants were settled on the suit property in 1983 it was not known when parcel No. 608 was sold by the other family and as at the time he was settling the two brothers in 1983 whether that parcel had already been sold. They argued that the respondent did not provide answers to these questions when they were put to him hence the finding of the trial court that the respondent recovered the land from a third party was wrong because there was no proof which was contrary to Section 107 of the *Evidence Act*.

36. On computation of time, counsel submitted that time started running from the time Charles Shikuku and the late Opete were shown where to construct their homes which is 1983. That although the trial court held that their stay was temporary, the nature of the temoray stay was not explainedand that there was no evidence to show when the appellants were to vacate the suit property if indeed they were to do so. Could argued that if that could have been the case, it could not have been for over 30 years.

37. Reliance was placed on the case of Sohanlaldurgadass Rajput & Another v Divisional Integrated Development Programmes Co. Ltd [2021] e KLR for the proposition that the object of limitation is to prevent a plaintiff from prosecuting stale claim on one hand and to protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The court was further referred to the case of Gathoni v Kenya Co-operative Creameries Ltd [1982] KLR 104 and argued that the law on limitation is intended to protect defendants against unreasonable delay in filing suit against them. Counsel maintained that the respondent having slept on his rights for over 30 years the honourable court could not help him as the parties mother and the appellants' father were all deceased and that therefore the lapse of time made it extremely difficult to get reliable evidence with the case.

38. On grounds 2, 3 and 6 of the appeal, counsel submitted that the respondent having allowed the appellants to stay on the land for over four years, allow them to construct homes and settle thereon, could not be allowed to turn back and demand that they vacate and move to a specific place. On legitimate expectation trust and the doctrine of estoppel, counsel relied on the case of Titus Mwiruri Doge v Kenya Canners Ltd [1988] e KLR limited 1988 EKLR for the proposition that if a party is made to believe in a certain state of facts and acts on them to his detriment and the other party stands by and does not stop him from so acting, that party is estopped from changing his mind. On that basis Counsel submitted that the principle of estoppel applied in this case considering the circumstances in the case that the respondent cannot on one hand allow their parents and their families to stay on their land for over 40 years, construct their homes, and settled there and turn back and demand that they vacate. Counsel submitted that the respondent having sold the land where the appellants were to settle and having misused their funds, he had to get them to settle somewhere and that is how he settled them on one acre of land each.Counsel referred to paragraph 28 of the judgment and argued that the trial court was wrong and misdirected itself as to how the appellants found themselves on the suit land. Counsel stated that the correct position was that both the 1st appellant, the late Opete and the respondent were all born on the suit property, grew up there and established their matrimonial homes there. That the appellants did not come on the suit property with their father as the trial court had misdirected itself. Counsel faulted the judgment arguing that the court relied on the evidence of the plaintiff regarding traditions and customs of the Batsotso people, from persons who were not necessarily experts in that

regard. That the tradition of the Batsotso people were never pleaded to enable the appellants respond to it and even bring their expert witnesses to testify in that regard.

Respondent's submissions

39. Counsel for the respondent submitted that the suit property was registered in the name of the respondent and that this was an equitable distribution of the estate of the late Muyonga. Counsel further argued that the marriage and inheritance of the respondent's mother by the late Musa did not entitle the appellant's to any rights in the suit property. That therefore there is no way the respondent would hold any portion of the suit property for the benefit or interest for the appellants.

40. It was argued for the respondent that the evidence showed that Musa died in 1991 and was buried on parcel No. Butsotso/ Ingotse/ 608. Counsel held the view that the father of the 1st appellant had parcel 608 and therefore had no interest in the suit property as long as the respondent was alive and had a family and that therefore there is no trust in favour of the appellants in view of these facts. Counsel further submitted that the evidence on record showed that the appellants were to share parcel Butsotso/ Ingotse/ 608 with Musa's first family which means that their share would be less than what has been registered their names. Counsel argued that there was no dispute that the respondent was instrumental in the appellants' registration as owners of their parcels of land and that their claim for a share of the suit property on account of their stay must fail.

41. Regarding the question of sub judice, counsel submitted that the same was adequately addressed by the trial court in paragraph five of the judgment. Counsel insisted that Musa having inherited parcel number Butsotso/ Ingotse/ 608 from his father muyanga the expectation of the respondent therefore was that the appellants' family would move onto their father's land.

42. Counsel relied on the case of Macharia Kihari v Ngigi Kihari and submitted that a matter or a claim for trust cannot be time barred where the plaintiff alleges existence of customery law that a suit can be brought after many decades. Counsel relied on the Supreme court's decision in the case of Isaac Mínanga v Theuri M'Lintari & Another [2018] e KLR regarding what should be proved in a claim for land based on trust under customary law. Counsel therefore argued that just as the appellants had been on the land for more than 12 years and brought their counterclaim in 2024 based on trust the respondent's claim regarding customery law cannot be time barred. Counsel took the position that since the parties were related, the respondent's claim could not be time barred.

43. Counsel further argued that there was no basis for a legitimate expectation by the appellants because the evidence showed that their father died in 1991 and had no issue and that the agreement he produced had no input from Musa. Counsel insisted that many tribes in Kenya are patriarchal and that the appellants cannot claim a share in land parcel 688 and argued that the appellants failed to prove their counterclaim. Reliance was placed on section 27 of the *Civil Procedure Act* in regard to the argument that costs in a suit shall be at the discretion of the court.

Analysis and determination

44. The court has carefully considered the appeal, the entire trial court record and the parties' rival submissions. Although this dispute was convoluted by the parties with narrations aimed at intersecting questions of succession, Batsotso customs, and land ownership; for this court, this dispute is a fairly straight forward matter considering that the jurisdiction of this court as delineated in Article 162 (2) (b) of *the Constitution* as read with section 13 of the *Environment and Land Court Act*, is to determine disputes concerning the environment and the use and occupation of, and title to land. This is not a family court and therefore questions of who should inherit which property according to Batsotso

customs will not be considered by this court as this court has no power to determine such matters. In that regard therefore, the focus of this court will be on parcel No. Butsotso/ Ingotse/688 which is the subject matter of this dispute as there is no contention on the ownership of parcel No. Butsotso/ Ingotse/608, although parties mentioned it extensively. The issue for determination by this court is whether the trial court was right in allowing the respondent's claim in regard to the suit property and at the same time dismissing the appellants' counterclaim.

45. The facts of the case herein are that one Muyonga married two wives, namely Salano and Esther. Salano was the mother of Musa. On the other hand, Esther was the mother of the respondent. When Muyonga died, Musa being an elder son of Muyonga inherited Esther his step mother and that union resulted in two children, namely; Charles Shikuku and Opete Musa among other children. It is not disputed that Muyonga owned parcel Nos. Butsotso/Ingotse/608 and 688, with Salano living on parcel Butsotso/Ingotse/608 and Esther living on parcel Butsotso/Ingotse/ 688. At adjudication, the respondent became the registered proprietor of parcel Butsotso/Ingotse/688. Before inheriting Esther, Musa's other wife and children were living on parcel No. Butsotso/Ingotse/608. Musa lived with Esther and the two sons on the suit property. Esther's children with Musa grew up, got married and put up homes on the suit property in the 1970s. All was well until Opete died in 2024 resulting in the respondent filing suit in the lower court seeking to stop the burial of the remains of Opete on the suit property and a declaration that the suit property belonged to him among other prayers. The respondent's contention being that under his clan (Batsotso) traditions, the appellants were expected to vacate the suit property and move to parcel No. parcel No. Butsotso/Ingotse/608 which belonged to Musa their father.

46. The mandate of this court as a first appellate court is to re-evaluate and re-analyze the evidence on record and make its own independent conclusions, bearing in mind that it had no advantage of seeing or hearing the witnesses, and make due allowance for that. This position was stated in the Cases of Selle & Another –vs- Associated Motion Boat Co. Ltd & Others (1968) EA 123 and Peters –v- Sunday Post (1958) EA 424.

47. Having considered the appeal herein the issues that arise for the court's determination are as follows;

    a. Whether the suit before the trial court was time barred.

    b. Whether the suit before the trial court was sub judice.

    c. Whether the respondent proved his claim on the required standard.

    d. Whether the appellants proved their claim of adverse possession and trust; and

    e. Whether the trial court was right in allowing the respondent's claim and dismissing the appellants' counterclaim.

48. The question of whether a matter is time barred is a question on jurisdiction of the court and the same must be addressed first before the court delves into the merits of the dispute.

49. Section 7 of the *Limitation of Actions Act* provide for time limit for filing a claim on land as follows;

> Actions to recover land
>
> An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

50. In paragraphs 14 and 15 of the plaint, the respondent pleaded that the clan met and held that traditionally, the 1st appellant and the deceased and their families were to abide by tradition and move to their father's parcel of land as the suit property was the respondent's inheritance. He also pleaded that the appellants had refused and neglected to abide by tradition and the fact that they are only entitled to benefit from their father's estate to move to land parcel No. Butsotso/ Ingotse/608.

51. It is not disputed that both the respondent and appellants were born on the suit property. From the greencard produced, the suit property was registered in the respondent's name on 7th October 1968. The respondent stated that the appellants put up their homes on the suit property in the 1970s when they got married and have since lived on the property with their children who have also put up their seperate homes. According to him, the appellants were to vacate his property when they attained the age of majority. The allegation that the clan asked them to move and that they refused is not supported by any evidence.

52. On the question of whether the suit was time barred, the trial court started counting time from when titles for parcel Nos. Butsotso/Ingotse/1680 and 1681 were issued. Those two titles were issued on 27th May 2022 being subdivisions of parcel No. Butsotso/Ingotse/608. As earlier observed in this judgment, the disputed property was parcel No. parcel No. Butsotso/Ingotse/688 and not 608 or subdivisions thereof. The determination of the period therefore had to be in regard to when the cause of action arose in respect of the parcel of land known as No. parcel No. Butsotso/Ingotse/688 and not any other parcel or parcel No. Butsotso/Ingotse/608. Hence, I am of the respectful view that the trial court was wrong using the time of issuance of titles for a parcel that was not in dispute to compute time. The trial court fell into error by holding that since the 1st appellant and the late Opete were reasonably expected to vacate the suit property and occupy parcel parcel No. Butsotso/Ingotse/608, time started running when parcel Nos. Butsotso/Ingotse/1680 and 1681 (subdivisions of Butsotso/ Ingotse/ 608) were registered in the appellants' names and that the cause of action arose when they refused to move to their respective parcels. I take the view that the legality of the appellants' occupation of the suit property was not dependant on whether or not there was alternative land for them to move to.

53. Section 26 of the *land Registration Act* provides for title as conclusive evidence of proprietorship as follows;

> Certificate of title to be held as conclusive evidence of proprietorship
>
> 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.

54. Therefore, unless registration was obtained by fraud, misrepresentation, want of procedure, illegality or corruption, a registered owner of land is vested with absolute and indefeasible ownership, subject only to overriding interests provided for in section 28 of the *Land Registration Act*.

55. Sections 24 and 25 of the *Land Registration Act* provide for interest conferred on registration and the rights of a proprietor respectively, granting a registered proprietor exclusive enjoyment of his or her land. On that basis therefore, lack of an alternative land to relocate to, by a trespasser who interferes with the enjoyment of land by the registered owner, is neither an overriding interest nor a lawful justification for such interference. Even merely being a family member of a registered proprietor of itself, cannot be a lawful justification for trespass just becuase there is no alternative land for the trespasser to relocate to.

56. The registration of a person as proprietor of land gives them absolute and indefeasible ownership which is not subject to whether a trespasser on such land has alternative land. In other words, a man/woman has no right over another's land simply because they havea no alternative land in their name.

57. For those reasons, I take the view that the trial court was therefore wrong in ascribing computation of time for filing suit regarding the suit property, on the registration of a parcel of land whose ownership was not contested.

58. I will now turn to the question as to when time to file suit began running in the circumstamces of this case. The respondent stated that the appellants were supposed to have left the suit property on attaining the age of majority or when they got married. That they got married in the 1970s and have established their homes and even their adult children have set up their homes on the suit property. The respondent was registered as owner of the suit property in 1968. Since the 1970s when the appellants put up their homes on the suit property and began exercising rights of ownership, the respondent never filed suit against them. I opine that as soon as the respondent was registered as owner of the suit property in 1968, he had the absolute rights to enjoy the same to the exclusion of the respondents and therefore it is my view that the cause of action herein arose in 1968 when the respondent became registered proprietor of the suit property.Therefore the appellants having been on the suit property from the time they were born, having put up homes thereon in the 1970s and lived there to date, while the respondent only filed his claim in 2024, a period of 56 years, I find and hold that the respondent's claim in the lower court was time barred and therefore the same is hereby dismissed on that basis. The respondent's suit in the trial court having been time barred, therefore, that court had no jurisdiction to determine the merits of the respondent's claim and therefore the grant of orders allowing the respondent's claim was null and void.

59. On the other hand, the appellants raised the counterclaim regarding the suit property based on adverse possession and trust. Again jurisdiction is everything. On the claim for adverse possession, the trial court held that it had no jurisdiction to determine the same. Section 38 (1) of the Law of *Limitation of Actions Act*, provides that a person who claims land under the doctrine of adverse possession may do so by applying to the High Court (ELC) for an order that he/she be registered as proprietor in the place of the registered proprietor. The Court of Appeal in the case of Pauline Chemuge Sugawara v Nairuko Ene Mutarakwa Kiritu & 4 Others Civil Appeal No. E141 of 2022 held that a Magistrates court has no jurisdiction to hear and determine a claim of land based on the doctrine of adverse possession. Therefore the trial court was right in finding that it had no jurisdiction to determine the appellants' claim on adverse possession.

60. On the question of trust, the appellants pleaded in paragraph 29 of the defence that the respondent having failed to secure another parcel of land for them and having allowed them to use and occupy a portion measuing two acresof the suit property, he was holding the land in trust for the two brothers. The appellants enumerated particulars of trust as having stayed on the suit property for over 20 years; peacefully utilizing the suit property without interruption in their lifetime; having established homes on the suit property and the plaintiff having received money to purchase land for the 1st appellant and

the late Opete and having failed to do so, he owed the appellants a portion of land worth the money received.

61. The Blacks law Dictionery 11th Edition defines "Trust" as follows;

> The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary) Afiduciary relationship regarding property and charging the person with title to the property with equitable duties to deal with it for another's benefit.

62. Section 28 of the *Land Registration Act* recognizes trusts as one of the overriding interest which though not reflected in the register, registered land is subject to. It provides as follows;

> Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-
>
> a. .....
>
> b. Trusts including customary trusts.

63. Therefore trust is an equitable remedy which arises where the title holder is not the true owner of the property but holds it for the benefit of another.

64. From the evidence given, the appellants narrated that the respondent purchased on their behalf, land measuring 4 acres in respect of which Musa, their father paid two cows. That the respondent later sold that land with intention to buy them another piece of land but that he failed to do so, which led him to give the appellants part of the suit property. I have considered the evidence furnished by the appellants and no agreement for purchase of four acres in their favour by or on behalf of Musa was produced showing that their father paid two heads of cattle as consideration thereof. Another aspect of the appellants' claim for trust is that they alleged to have been on the suit property for over 20 years, a matter that is not disputed. While effluxion of time may raise prescriptive rights, I do not think that, that alone can create a trust or constitute an element of trust as pleaded by the appellants. In the premises therefore, I am not convinced that the appellants proved trust or that the respondent gave them the suit property because he failed to replace the land which he had purchased for them but subsequently sold. In the premises the appellants' claim for the suit property based on trust fails.

65. The appellant also argued that the trial court was wrong in granting costs to the respondent when they are family. The award of costs is a matter for the court's discretion, which ought to be exercised judiciously. Section 27 of the *Civil Procedure Act* provides that costs are awarded at the court's discretion provided that they follow the event. This court will not interfere with the trial court's exercidse of discretion unless it is shown that the trial court considered irrelevant matters or failed to take into account relevant matters. It is not codified that where family is concerned there can be no award of costs, but the court ought to treat each case on its own merit in so far as costs are concerned. When awarding costs to the respondent, the trial court did not consider the fact that the parties are children borne from one mother. This relationship of the parties in my view was a relevant matter to be considered before an order awarding costs was made. In the premises in failing to take into consideration the fact that the appellants are brothers and the circumstances that led to them being on the suit property, the trial court fell in error, and therefore this is a proper case for this court's intervention in regard to exercise of discretion by a trial court. Since the parties herein are children borne of the same mother and live on the same land, it is only fair that each party bears its own costs.

66. Ultimately, the appeal partially succeeds to the extend that the lower court judgment is set aside and substituted with an order that the respondent's suit before the trial court is hereby dismissed for being time barred and the appellants' claim of the suit property fails on the basis that the trial court had no jurisdiction to determine the claim on adverse possession and the claim on trust was not proved on the required standard. Each party shall bear its own costs of the appeal and the costs in the court below.

67. It is so ordered

DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY THIS 25TH DAY OF SEPTEMBER, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of

Mr. Shaka holding brief for Mr. Kombwayo for the appellants

No appearance for the respondents

Court Assistant- Delphine