



**Mochoge v Makori (Environment and Land Appeal E039 of 2024)
[2025] KEELC 7384 (KLR) (29 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7384 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E039 OF 2024**

M SILA, J

OCTOBER 29, 2025

BETWEEN

GLADYS KEMUNTO MOCHOGE APPELLANT

AND

VIDELIS AKUNGA MAKORI RESPONDENT

*(Being an appeal against the judgment of Hon. C.A. Ocharo, Chief Magistrate,
delivered on 19 September 2024 in the suit Kisii CMELC No.E088 of 2021)*

JUDGMENT

(Respondent claiming land that he purchased from a third party in 2010; at time of sale, land registered in name of the deceased father-in-law to the appellant; alleged that the deceased was holding part of the land in trust for the father of the seller; trial court holding that the respondent deserves the portion of land purchased; on appeal, court not persuaded that the sale to the respondent was a proper sale; the seller had no land to sell as the land was registered in the name of the deceased and no succession had been done; appeal allowed)

1. The suit from which this appeal emanates was commenced by the respondent through a plaint filed on 19 July 2021. In the plaint, the respondent pleaded that he has been residing in 0.1 Ha of the land parcel West Kitutu/Bogeka/620 registered in name of Arisi Nyanusi (deceased) having purchased it in the year 2010. He pleaded that the appellant filed a succession cause Kisii CMSuccession Cause No. 337 of 2018, in respect of the estate of Arisi Nyanusi, but failed to include him as a beneficiary. He averred that he and the appellant had earlier agreed how his title would be obtained from the suit land but the appellant changed her mind midway and denied his rights as purchaser. In the plaint, the respondent asked for the following orders :
 - a. Declaration that the plaintiff (respondent) be registered as the owner of part of land parcel West Kitutu/Bogeka/620 measuring 0.1 Ha where he resides.



- b. Cost and interest at court rates.
 - c. Such further and/or relief as the Honourable Court may deem fit and expedient so to grant.
2. The appellant filed defence and counterclaim. She pleaded that the respondent's claim of beneficial interest in the suit land vide an objection filed by the respondent in the succession cause was found to be unmerited and was dismissed, and that the succession cause is finalized. She denied entering into any agreement with the respondent or that she consented to any agreement for sale, or disposition of any part of the suit land. She pleaded that the suit land was owned by her late father-in-law, Arisi Nyanusi, who died on 2 July 1998. She asserted that the person who sold the land to the respondent, one Peter Mokaya Gechocho, is a stranger to the estate of Arisi Nyanusi and never acquired any rights over the suit land. She contended that the respondent is in forceful occupation of the suit land. In the counterclaim, she pleaded that in the year 2010, the respondent trespassed into the suit land and continues to occupy it. She pleaded further that in the year 2014, the respondent tried to trick her to have him unlawfully subdivide the suit land in a bid to unlawfully sever the portion that he illegally occupies, but the Land Registrar on discovery of the respondent's fraudulent scheme, cancelled the subdivision. In the counterclaim she asked for the following orders (slightly paraphrased for brevity) :
 - a. General damages.
 - b. An order that the (respondent) be evicted from the part of the suit land occupied by him.
 - c. A permanent injunction restraining the respondent from entering, occupying, or interfering with any part of the suit land.
 - d. Costs of the counterclaim.
 - e. Interest on (a), (b) and (c) above.
 - f. Any other relief the court may deem fit to grant.
3. At the hearing, the respondent testified that he purchased the portion he was claiming from one Peter Mokaya Gechocho. It was elaborated that Peter Mokaya Gechocho was a son of one Christopher Gechocho (deceased). It was alleged that Christopher Gechocho had a share in the suit land, and that though the suit land was registered in the sole name of Arisi Nyanusi, he held it in trust for Christopher Gechocho. It was said that during adjudication, Christopher Gechocho was in Nairobi and that is how the land was solely registered in the name of Arisi Nyanusi. It was contended that this share of Christopher Gechocho was well demarcated on the ground and that it was previously occupied by Peter Gechocho before he sold it to the respondent. That sale agreement between the respondent and Peter Gechocho is dated 14 July 2010. It was also claimed that the appellant was aware of this sale and acquiesced to it. The respondent further testified that he took possession, and built his home without any protest from the appellant. It was when he wished to put power that the appellant protested and reported him to the Chief. He testified that he then entered into an agreement with the appellant dated 29 November 2014 which he exhibited. He testified that the dispute was referred to elders who determined that the two portions should be separated vide a decision made on 12 November 2016. He testified that the appellant signed mutation forms and also made the requisite application to the Land Control Board. He testified that two title deeds were issued, being parcels No. 5673 and 5674, but when the appellant protested the Land Registrar kept them pending. He acknowledged that he did a search when buying the land and it revealed the owner to be Arisi Nyanusi. He also yielded that Peter Mochocho was not listed as a beneficiary of the estate of Arisi Nyanusi in the succession cause.
4. PW-2 was one Cleophas Kebati Ondieki. His evidence was that he undertook a survey of the land after being instructed by the appellant who came to his office accompanied by the respondent. He



- claimed that she (appellant) paid him and they later went to the suit land and they took measurements in accordance with the ancestral boundaries. He testified that she subsequently signed all documents voluntarily and that her change of heart is ill motivated. Cross-examined, he conceded that he was not a licenced surveyor. He claimed to be an Approved Assistant but he had nothing to demonstrate his qualifications to undertake survey.
5. PW-3 was Beatrice Kwamboka Riang'a. She is a sister of Peter Gechocho. She was a witness to the sale agreement that was entered between her brother and the respondent on 14 July 2010. According to her, the part sold was owned by her late father Christopher. She claimed to have been brought up on this land and that this portion was well demarcated. Cross-examined, she acknowledged that she had no proof to support the contention that the land was partly owned by Christopher. She acknowledged that it was never registered in name of Peter Gechocho. She also conceded that the appellant was not a party to that sale agreement. She affirmed that they were not related to the appellant. She elaborated that the appellant's husband (son of Arisi Nyanusi) is deceased and she (appellant) was thus entitled to pursue succession of the estate of Arisi.
 6. PW-4 was Simeon Achichi Ngare, a clan elder. His evidence was a reiteration that the land was properly sold by Peter Gechocho and he mentioned that as clan elders they have knowledge of the history of the land. He testified that Peter Gechocho was living on the land. He was also among the elders that sat to deliberate on the dispute on 12 November 2016 and they determined that this portion of land was owned by Christopher Gechocho. Cross-examined, he testified that he is not from the same clan as the appellant. He also could see that the sale agreement between Peter Gechocho and the respondent did not describe the land being sold. He affirmed that Arisi and Gechocho were not related. He conceded that the appellant did not sign the minutes of the elders.
 7. With the above evidence the respondent closed his case.
 8. The appellant's evidence was that she acquired title to the suit land after undertaking a succession process for the estate of Arisi Nyanusi. She obtained a grant of letters of administration on 28 November 2019 which was confirmed on 16 November 2020 vide Kisii CMSuccession Cause No. 337 of 2018. She stated that Peter Mokaya Gechocho was a stranger to the estate of Arisi Nyanusi and had never acquired any interest in the suit property. She stated that the respondent forcefully entered the land in 2010 and built a permanent home on it. She stated that he tricked her to subdivide the suit land to unlawfully acquire the portion that he occupied and that when the Land Registrar discovered the fraudulent scheme he cancelled the subdivision. Cross-examined, she mentioned that she came to this home in 1993 and was there while the respondent developed his house. He also planted trees and fenced off this portion. She denied signing any mutation form or transferring land to the respondent. She denied engaging a surveyor during the succession process and did not know PW-2. She mentioned that she made a report to the police that the respondent had tricked her to subdivide the property. She pointed out in re-examination that her photograph was not in the transfer forms displayed by the respondent, and the mutation form is not dated. She also pointed out that the sale agreement displayed by the respondent had no particulars of the land being sold.
 9. DW-2 was Fredrick Makarios Manoah. He stated that he is a cousin to Arisi Nyanusi. His evidence was that the land belonged to one Omwamba Rwabe before adjudication and he sold it to Arisi. He testified that Arisi never sold the land to anyone until his demise in 1998. He stated that Peter Gechocho was a neighbour and they are not related. According to him the Gechocho's land is adjacent to the suit land and that is why the respondent may have been tricked to buy the suit land. He testified that he never heard of any dispute between Arisi and Gechocho. He however did not know the parcel number of Gechocho.



10. With the above evidence, the appellant closed her case.
11. Counsel filed their final submissions and judgment was delivered on 19 September 2024. In her judgment, the trial Magistrate did find that the suit land was initially registered in the name of Arisi Nyanusi and had been transferred to the name of the appellant upon succession. She found that in the proceedings in the succession cause, the respondent was recognized as having an interest in the suit land as purchaser which interest was acknowledged by the Chief in his introductory letter for the succession matter. She was of opinion that the appellant was aware of the sale and her actions were of ‘see no evil, hear no evil.’ She did not believe that the appellant was not aware of the sale and that she was now feigning ignorance. She found that the appellant was present while the respondent fenced the portion, planted kei-apple and constructed his home, but raised no complaint. She was not persuaded by the submissions of the appellant that the actions of Peter Gechocho and PW-2 were intermeddling in the estate. She held that during the lifetime of Gechocho and Arisi, there was no dispute between them. She found that the sale by Peter Gechocho was sincere, based on the belief that Arisi Nyanusi held the land in trust for Charles Gechocho. She held that trusts are overriding interests which are not necessarily registered and the court can infer the same from the conduct of the parties. She found that the appellant did not disprove the claim that there existed a trust and that Peter Gechocho and PW-2 were disposing their interest. She did not believe the allegation of the appellant that the Land Control Board consent and transfer documents were not signed by her. She held that the intention was clear and that these documents caused subdivision and subsequent registration. She found that the appellant was not acting in good faith and that she had full knowledge of the interest of the respondent at the time that she was registered. She held that the law and equity would protect the right of the respondent as he had fenced the land, extensively developed it, and lives there with his family. She held that ‘the plaintiff has proved on a balance of probability that he acquired interest over a portion of the suit property as an innocent purchaser without notice of any encumbrance that may have been.’ She also found that the counterclaim was time barred for reason that she found that the appellant had discovered the fraud in 2010 so the claim should have been instituted within 3 years but the same was being filed 8 years later. She therefore entered judgment for the respondent and struck out the counterclaim.
12. Aggrieved, the appellant has not preferred this appeal. The Memorandum of Appeal is quite lengthy, covering five pages, and 12 grounds are listed some with sub-paragraphs. I see no need of copying the same but will mention that among the grounds is that the trial court erred in finding that there was a trust; finding that the respondent properly acquired the suit land; and finding that the succession court found that the respondent had a beneficial claim when the ruling of the court was to the contrary. The appellant seeks that the judgment be set aside and it be substituted with a dismissal of the respondent’s case and for her counterclaim to be allowed.
13. The appeal was argued through written submissions and I have taken note of the submissions filed.
14. We need to recall that it is the respondent who commenced the suit and what he wanted in his plaint was to be registered as owner of 0.1 Ha of the suit land. He claimed to have purchased this portion from Peter Mokaya Gechocho and contended that the appellant ought to have included him as a beneficiary in the succession matter but failed to do so. He also contended that the appellant was willing to transfer this portion to him but changed her mind midstream. On her part, the appellant asserted that Peter Gechocho was a stranger and had no capacity to sell the land to the respondent. She made pleadings to the effect that the respondent had tricked her to subdivide the land and alleged forceful occupation by the respondent. She wanted the respondent evicted and permanently restrained from the land.
15. It is common ground that the suit land was registered in the name of Arisi Nyanusi on 5 August 1976 as first proprietor upon adjudication. He died on 2 July 1988. The appellant is a daughter-in-law



of Arisi Nyanusi having been married to a son of Arisi Nyanusi who died. There was no succession done in respect of the estate of Arisi Nyanusi until the appellant filed Kisii CM Succession Cause No. 337 of 2018. Within that case, the respondent filed an objection claiming a purchaser's interest but his objection was dismissed in a ruling delivered on 13 November 2019. The appellant subsequently obtained a grant of letters of administration on 28 November 2019. That grant was confirmed and the property transmitted to her on 14 April 2021. The property is registered in the name of the appellant to hold in trust for herself and six other beneficiaries who I believe would be her children or successors of Arisi Nyanusi. This title will have to remain undisturbed unless the respondent makes a legitimate claim for the land and I now proceed to interrogate his claim.

16. His claim is based on the allegation that he purchased from Peter Gechocho what was believed to be the share of his father Christopher Gechocho in the suit land. It was indeed posited that despite Arisi Nyanusi being registered as sole proprietor, he held part of the suit land in trust for Christopher Gechocho, for reason that Christopher Gechocho was in Nairobi at the time of adjudication. Now, we must be alive that any allegation of trust must be proved by hard evidence because if this was not so then any person can allege that a person is holding land in his trust when there is nothing of that sort. In the case of *Isack M'inanga Kiebia vs Isaaya Theuri M'Lintari & Another (2018)Eklr* the Supreme Court expressed itself as follows in issues regarding trust :

“.... Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favor of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land.
2. The claimant belongs to such family, clan, or group.
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.

17. Now, the evidence was stark that Arisi Nyanusi and Charles Gechocho were not relatives. Neither was there any evidence led that they purchased this land together so that one party may be considered as holding in trust the other person's share. It was also never said that Charles Gechocho bought from Arisi Nyanusi part of the land during their lifetime but the transfer was not effected. Indeed, no evidence of any transaction between Arisi Nyanusi and Charles Gechocho was ever presented. That being the case, it is not clear to me what sort of trust was being alleged here. It was certainly not out of any filial relationship and not out of joint purchase, or subsequent purchase by Charles Gechocho for part of the land. Absent these three reasons, and there being no evidence whatsoever on what basis it was alleged that one party held the land in trust for the other, I find it difficult to find any basis upon which it could be held that Arisi Nyanusi held part of the land in trust for Charles Gechocho. In any event, no suit was ever filed by Charles Gechocho or his successors to seek any declaration of trust. My finding is that trust between Arisi Nyanusi and Charles Gechocho was not proved.



18. Having not proved a trust, then there would be no basis upon which Peter Gechocho would sell to the respondent land that was registered in the name of Arisi Nyanusi. He did not hold any grant of letters of administration for the estate of Arisi Nyanusi and neither was he a beneficiary of his estate. He never filed any suit to excise a portion of the suit land on the basis that it is held in trust. He was indeed a total stranger to the suit property and to the estate of Arisi Nyanusi as asserted by the appellant.
19. The fact of the matter is that as at 2010, the estate of Arisi Nyanusi was unadministered. There was nobody holding any grant of letters of administration for his estate. A succession cause had not even been filed. In my considered view, the act of Peter Gechocho selling land registered in the name of Arisi Nyanusi who was deceased at the time, was an act of intermeddling in the estate of a deceased person which is barred by Section 45 of the *Law of Succession Act*, Cap 160, Laws of Kenya, which is drawn as follows :
45. No intermeddling with property of deceased person
- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.
20. The above law is clear. Inter alia, no person is to dispose any free property of a deceased person. It follows that the purported sale agreement between Peter Gechocho and the respondent was a sham and null and void. Peter Gechocho was not even a relative of the deceased registered proprietor. Peter Gechocho had no land to sell to the respondent, and the respondent cannot therefore claim to have acquired any interest pursuant to that purported sale agreement. In other words, there is no way the respondent can be held to have acquired an interest in the suit land pursuant to that sale agreement. It is not worth the paper that it is written upon.
21. The trial Magistrate seems to have put a premium on the conduct of the appellant after the respondent came to the land. The conduct of the appellant changes nothing. For starters, she was not the one who sold the suit land and she was certainly not a party to that sale agreement in any way. Secondly, she was not an administrator of the estate of Arisi Nyanusi in 2010 for it to be claimed that she has acquiesced to the sale of some land belonging to Arisi Nyanusi. She had no capacity to enter into any dealings in respect of the estate of Arisi Nyanusi. She had no capacity to carry out a survey and subdivision of the suit land, no capacity to prepare mutation forms, and no capacity to cause the issuance of two title deeds purportedly upon subdivision of the suit land. In any event, this alleged subdivision of the suit land never saw the light of day as it was nipped in the bud by the Land Registrar as I have not seen any change in the register of the suit land to create two subdivisions from it. The trial court fell into error in placing premium on the alleged conduct of the respondent and the alleged subdivision of the land that in fact never was.



22. In her judgment, the trial Magistrate was of opinion that this conduct of the respondent created an equity in favour of the respondent. Yet again she fell into error. As I have said, but I will repeat again, any action, reaction, or inaction of the appellant, could not affect the estate of Arisi Nyanusi or property registered in his name, as the appellant was not the Legal Representative of his estate at the time. Her inaction, or action, could not therefore be visited on the estate of Arisi Nyanusi or on any property registered in his name. Until she obtained a grant of representation for the estate of Arisi Nyanusi, her activities could not be said to be representative of the estate of Arisi Nyanusi.
23. Indeed, I am persuaded that the respondent must have tried to sway the appellant to have her transfer the suit land to him. That is the trickery that the appellant was talking about and it is true. The respondent appears to have given money to the appellant so that the appellant can take steps to transfer the land to him at a time when the appellant was not a representative of the estate of the deceased. The respondent was trying to induce her with money for her to do an illegal act. I do not see how equity can come to the aid of such a person who is more than willing to bend the law so that he can get what he craves. It would appear that at some point the appellant came to her senses, or sought advice, and proceeded to do the right thing by filing a succession cause.
24. I see that within the succession cause the respondent wished to be included in the distribution of the estate as a purchaser. His claim was dismissed in the ruling of 13 November 2018. Now, with that dismissal, could it be said that the succession court recognized him as beneficiary? Certainly not. It is however true that in the ruling of the court, while determining the objection, the court made some comments that would seem to suggest that the court was sympathetic to the cause of the respondent; but such comments were only obiter, and did not form the ratio decidendi, which was a dismissal. It was erroneous for the trial court to take those comments made obiter, so as to hold that the succession court found that the respondent had a legitimate interest in the suit land. If the succession court had held that the respondent had a legitimate interest then that court would have included him as beneficiary but it did not. Instead, the respondent's objection was dismissed.
25. In her judgment, the trial court held that because the respondent had developed the land and settled on it then he deserved protection. That cannot hold. The respondent would only deserve protection by virtue of occupation if he could demonstrate a right by dint of adverse possession. I know of no other legal channel of a person claiming interest in land through occupation other than through the doctrine of adverse possession. But this was no case for adverse possession and in any event 12 years had not lapsed from 2010 to 2021 when this suit was filed so as to afford protection to the respondent by virtue of his possession. Without 12 years having lapsed, no right can be said to have crystallised in favour of the respondent by dint of his possession of the land. In the same way that a trespasser lives at the mercy of the land owner, so too was the manner in which the respondent occupied the land. He was in illegal occupation and he could be removed at any time, notwithstanding the nature of developments that he had made on the suit land. The sympathy that the court had for the respondent was misplaced.
26. I also see that the trial court struck out the counterclaim on the reasoning that it was out of time. She held that the appellant had pleaded that she discovered the fraud in 2010 but failed to act within three years. Yet again, she fell into error. First the appellant had no capacity to act in 2010. Secondly, the counterclaim was a claim for possession of land; it was thus an action to recover land. An action to recover land has a limitation period of 12 years, not three years, and this is provided for under Section 7 of the *Limitation of Actions Act*, which is drawn as follows :-

S. 7. 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.

27. If we assume that the cause of action accrued in 2010 when the respondent took possession, and we assume that the action to recover the land was the time that the counterclaim was filed, 12 years had not lapsed and therefore it cannot be said that the counterclaim was time barred. There was no basis to strike out the counterclaim on the argument that it was time barred.
28. I am sorry for the respondent. However, he cannot run away from the fact that he purchased land from a person who had no capacity to sell. He could not purchase land of a deceased person without succession being done. In fact he purchased land from a person who was not even a relative of the deceased proprietor. He ought to have done his due diligence properly before purchasing the land and undertaking massive investments in it. A prudent person does not embark on making huge investment in land that he has no title to. It has already been decreed in the succession case that this land is of the appellant and it is not just hers, she holds it in trust for the beneficiaries of Arisi Nyanusi. I find no basis to disturb this registration as the respondent never acquired a legitimate interest in the suit land.
29. The long and short of it is that I am persuaded that this appeal must succeed. I proceed to set aside the judgment of the trial court. I substitute it with an order that the suit of the respondent is dismissed and the counterclaim of the appellant is allowed. I give the respondent up to 31 December 2025 to give vacant possession of the suit land to the appellant or else the appellant can move to apply for his eviction. From 1 January 2026, the respondent is permanently barred from entering, being upon, utilising, or in any way interfering with the land parcel West Kitutu/Bogeka/620.
30. The appellant will have the costs of the suit and counterclaim before the lower court and also the costs of this appeal.
31. Judgment accordingly.

DATED AND DELIVERED THIS 29 DAY OF OCTOBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Were h/b for Mr. O.H Bunde for the appellant

Mr. Masolo instructed by M/s J.M. Nyagwencha & Company Advocates for the respondent

Court Assistant – Michael Oyuko

