

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ELCLA NO. E001 OF 2025

HERMAN LUGONZO KAVULI..... APPELLANT

VERSUS

ANDREW TSIHUGWA KAVULI..... RESPONDENT

(An appeal from the ruling of the Honourable Magistrate Beryl A. Omollo delivered on 4th December 2024 in VIHIGA SPMC ELC NO. 31 OF 2019)

JUDGEMENT

Introduction

Vide the Memorandum of Appeal dated 3rd January 2025 the appellant challenged the ruling dated 4th December 2024 in Vihiga SPMC EL Case No. 31 of 2019 and sought for orders that the ruling be set aside, and the Chamber Summons application dated 7th December 2023 be dismissed with costs to the appellant.

A brief background of the appeal as can be gathered from the record of appeal is that vide the plaint dated 4th July 2019, the appellant filed case NO. VIHIGA SPMCEL CASE NO 31 OF 2019 claiming for a declaration that the respondent is holding in trust for him, land parcel No. N/MARAGOLI/CHAMAKANGA/537, an order that the respondent sub divide and partition parcel No. N/MARAGOLI/CHAMAKANGA/537 as is on ground in favour of the plaintiff and costs of the suit.

The record shows that before the suit was heard a preliminary objection was raised by the respondent which preliminary objection was upheld vide the court's ruling dated 5th December 2019 vide which the court struck out the suit as having been filed out of time.

The record further shows that vide a chamber summons application dated 7th December 2023, the respondent sought for orders that; -

- a) The honourable court be pleased to grant an eviction order against Herman Lugongo Kavuli (Plaintiff/Respondent)/ his servants/ agents/family members.
- b) An order to remove structures/restrictions put on the suit land property by the plaintiff/his servants/agents/family members
- c) That the costs of the application be provided for by the plaintiff/respondent.

In reply to the application the appellant filed a Replying Affidavit sworn on 22nd May 2024 urging the court to dismiss the application.

The record shows that the application was heard before the trial court which vide the ruling delivered on 4th December 2024 found that the application had merit and allowed it making the following orders:

- i. the court grants an eviction order against Herman Lugonzo Kavuli (plaintiff/respondent) his servants/agents/family members.
- ii. an order is hereby issued to remove structures/restrictions put on the suit property by the plaintiff/his servants/agents/family members.

Dissatisfied with the ruling, the appellant preferred the present appeal.

Submissions

Pursuant to direction given on 11th June 2025, the appeal was heard of by way of written submissions.

On behalf of the appellant written submissions dated 7th July 2025 were filed by Ben Aduol Nyanga & Co. Advocates and on behalf of the respondent, written

submissions dated 20th August 2025 were filed by Mitiambo & Company Advocates.

Issues for determination

Although the Memorandum of Appeal contained 12 grounds of appeal, the appellant compressed the same into 4 issues for determination namely; -

- a) Whether the learned Magistrate erred in law and fact by granting eviction orders despite evidence of family occupation and trust.
- b) Whether the appellant's claim was time barred under the Limitation of Actions Act.
- c) Whether the court properly evaluated the equitable interests, including constructive trust or resulting trust.
- d) Whether the ruling was procedurally and substantively sound.

On behalf of the respondent the following issues were framed;

- a) Whether or not the appellant's claim in the lower court was time barred.
- b) Whether this honourable court has jurisdiction to hear issues pertaining to Nairobi HC Succ Cause No. 500 of 1995,
- c) Whether the appeal lacks merit

From these issues as framed by the parties and the record generally, the following emerge as the common issues for determination herein: -

- a) Whether or not the trial court erred in allowing the Chamber Summons application dated 7th December 2023.
- b) Whether or not the appeal herein is in respect of the ruling date 5th December 2019 striking out the suit.
- c) Whether or not the appeal has merit.
- d) Costs of the appeal.

Analysis and determination

This being a first appeal, this court is enjoined to reexamine the evidence placed before the trial court so as to arrive at independent conclusion and findings. (See cases of Selle & Another vs Associated Motor Boat Company Limited and Others [1968] EA 123 and Gitobu Imanyara & 2 others –vs- Attorney General [2016] e KLR and section 78 of the Civil Procedure Act)..

The first issue for determination is whether or not the trial court erred in allowing the Chamber Summons application dated 7th December 2023 (herein called the application)

The substantive relief sought in the application was for the eviction of the appellant from the suit land and for removal of his structures/restricts therefrom.

The grounds upon which the application was brought were that the appellant illegally occupied the suit land and put up illegal structures/restrictions and that he (appellant) had refused to vacate the suit premises.

In his Supporting Affidavit sworn on 7th December 2023 the respondent averred that the appellant had willingly, deliberately and without justifiable cause encroached onto the suit land. That the appellant's suit had been dismissed with costs to the respondent on 5th December 2019. That the appellant lacks *locus standi* and that the appellant's action amounts to an act of trespass and is therefore unlawful hence eviction orders should issue.

The appellant's position as contained in the Replying Affidavit was that he is a beneficiary of the estate of Kabuli Lamwenya (deceased) as named in succession

cause No, NAIROBI HC SUCC C. NO 500 of 1995 and hence entitled to a portion of the suit land as occupied on the ground.

The record shows that the trial court took into account the period it had taken since the suit land was transferred in favour of the respondent to the date of filing the suit and observed that under section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya, suits for recovery of land had to be filed within 12 years from the date the cause of action arose.

On that basis, the court found that the application should be allowed and proceeded to grant the orders sought.

The appellant faults the trial court for these findings and decision and submits that eviction is a drastic remedy that can only issue where the rightful possession of the land is established beyond dispute and there is no competing equitable or overriding interest. That the trial court failed to consider that the appellant and other family members were already in possession of the land which they believed to be part of their father's estate. Counsel relied on the case of *Isaac M'inanga Kieba -vs- Isaaya Theruri M'Lintari & another (2018) eKLR* on where customary law rights may give rise to a constructive trust or an overriding interest.

On behalf of the respondent, it was submitted that the appeal is frivolous, vexatious and without merit, is scandalous incompetent, bad in law and otherwise an abuse of the court process.

It is clear from the entire proceedings of the case that no substantive trial took place. The suit was struck out for having been filed out of time. The respondent had no claim in the suit. He never filed a counterclaim. He had only denied the appellant's claim. The issue of trespass and therefore eviction were never part of the suit and therefore never heard.

The procedure for removal of an unlawful occupant of private land is provided for, inter alia, in section 152E of the Land Act No. 6 of 2012. I find no evidence that the procedure was complied with. I find that the application was improperly brought in the suit.

The annexures to the Replying Affidavit disclose the existence of a succession cause in which the appellant was named in the succession cause as one of the beneficiaries of the estate of the deceased together with the respondent.

I find that the trial court erred in allowing the application.

The 2nd issue for determination is whether the appeal is in respect of the ruling dated 5th December 2019 that struck out the suit.

The Memorandum of appeal is clear that the appeal is against the ruling dated 4th December 2024. Hence the court cannot address the issue of whether or not the suit had been filed out of time or whether the court erred in striking out the suit.

The court finds that the appeal has merit and hereby allows it by setting aside the ruling dated 4th December 2024, and substituting it with an order dismissing the Chamber Summons dated 7th December 2023. Each party to bear own costs of the appeal.

Orders accordingly.

Judgement dated and signed at Vihiga, delivered virtually this 20th day of January 2026 .

**E. ASATI,
JUDGE.**

In the presence of:

Maureen- Court Assistant.

Ayuma h/b for Nyanga for the Appellant
Mitiambo for the Respondent.