

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
KISUMU ELCLA NO. E078 OF 2024

GRACE OCHAM ODIEK

NOAH ONDIEK APPELLANTS

VERSUS

TERESA OTIENO

WILLIS OCHIENG GWARA RESPONDENTS

(An appeal from the judgment of the Honourable E. Obina SPM in KISUMU CMC ELC NO E12 OF 2020 delivered on 3/9/2024)

JUDGEMENT

Background

The Record of Appeal filed herein dated 2nd May, 2025, shows that the appellants were the plaintiffs in KISUMU CMC ELC NO. E12 OF 2020 (herein, the suit) wherein they had sued the respondents vide the plaint dated 7th October, 2020. The subject matter of the suit was a parcel of land known as KISUMU/KAPUONJA/25 measuring approximately 1.9 Ha (the suit land herein).

The appellants claimed in the suit that at all material times the 1st appellant was the sole registered proprietor and/or beneficial owner of the suit land. That the respondents had unlawfully entered onto, occupied, and started erecting permanent and temporary structures on a portion of the suit land. The appellants

therefore sought for orders of eviction, permanent injunction, and costs of the suit against the respondents.

The respondents filed a defence and counterclaim, vide which they denied the appellants' claim and prayed that the same be dismissed. They claimed that the suit land was owned by both the families of the appellants and the respondents and that each family occupied their respective share. That the registered owner was holding part of the suit land in trust for the respondents.

They prayed the court to order the Land Registrar and Surveyor Kisumu to visit and survey the suit land and have the respondents registered as owners of the portion currently occupied by them.

The suit was heard before the trial court which, vide the judgment dated 3/9/2024, found that the appellants had failed to prove their claim on a balance of probabilities. The court found that the 1st appellant was holding the title in respect of the suit land in trust for herself and the respondents and entered judgment in favour of the respondents on the counterclaim.

The appeal.

Dissatisfied with the judgment, the Appellants filed the present appeal vide the Memorandum of Appeal dated 14th September,

2024, on the grounds that the learned trial Magistrate erred in law and fact;

1. in failing to analyze and evaluate the evidence and submissions presented by the parties thus ended up reaching a wrong decision.
2. in making a finding in favor of the respondents despite the evidence and fact that the respondents' counterclaim was fundamentally and incurably defective for reasons that it was not accompanied by a Verifying Affidavit as required by law.
3. in finding that the appellants had not proved a *prima facie* case on a balance of probabilities despite evidence that the appellants are beneficiaries of the first registered owner of the land parcel, which ownership and title are indefeasible under the law.
4. by heavily relying on evidence that was never produced before court (a chief's letter) and which piece of evidence did not form part of the court proceedings thus relying on extraneous matters in reaching his wrong decision.
5. in failing to find that the respondents did not have a customary law claim to any portion of the appellants' land

parcel since the appellants were not related to the respondents in any manner whatsoever and evidence of such relationship was not independently presented before court.

6. in filing to address and analyze the historical ownership evidence of the suit land tendered by the appellants, which indicates that the first registered owner of the suit land in 1978 was the deceased husband of the 1st appellant and no objection to the registration was ever raised by the respondents and their relative during the lifetime of the first registered owner of the suit parcel.
7. in failing to make a finding and a determination as to whether the respondents' customary claim could stand when at the same time the respondents claim acquisition of the portion of land by way of adverse possession.
8. by making an ambiguous and absurd decision in which the Land Registrar is directed to survey and subdivide land when the respondents have not stated what acreage of the land they have been occupying, and which decision will only fuel the dispute instead of settling the dispute.

9. in treating the submissions filed by the appellants in a casual and cavalier manner, thus occasioning a miscarriage of justice.

and sought that the appeal be allowed and the judgment of the trial court be set aside with costs.

Submissions

The appeal was heard by way of written submissions.

Written submissions dated 25th July, 2025, were filed by Odhiambo Gwada & Co. Advocates on behalf of the appellants. Counsel submitted that the counterclaim filed by the respondents offended the provisions of Order 7 Rule 5 (a) of the Civil Procedure Rules as it was not accompanied by a Supporting Affidavit, and that despite the appellants raising the issue, the trial court failed to make a finding on the same.

Counsel submitted that the trial Magistrate erred in law in failing to find that the appellants had established a *prima facie* case on a balance of probabilities and that the title they had was as a result of a first registration in the name of Sulphenus Ondiek Ouko, who acquired an indefeasible title in 1976.

That the respondents never produced any exhibits in court.

That the respondents have never questioned the 1st registration of the suit land. They have never alleged any fraud or mistake as regards the 1st registration and are therefore estopped from now claiming interest on the appellants' parcel No. KISUMU/KAPUONJA/25.

That the trial court erred in failing to find that the appellants had established a *prima facie* case.

That the trial Magistrate acted in a manner prejudicial to the appellants' case when he relied heavily on the Chief's letter which was not part of the court record or part of the exhibits or evidence.

That the appellants were denied an opportunity to challenge the Chief's letter. That it was from the contents of the said Chief's letter that the trial court formed the opinion that the parties were related and that a customary trust existed yet the appellants had testified that the respondents were mere trespassers who came to their land upon invitation by their relative who had been granted entry into the land briefly only for them to refuse to leave prompting the appellants to seek police assistance whereby they were advised to obtain eviction orders first.

That the respondents are duty-bound to discharge the burden of proving their relationship to the appellants and the existence of the customary trust over the suit parcel of land.

Counsel relied on the case of Isaak M'Inanga Kieba - vs - Isaya Theuri M'Linturi & another (2018) eKLR on the elements of customary trust and submitted that in the present case, the respondents failed to demonstrate any of the elements of customary trust and that the respondents only claimed occupation of a portion whose acreage they did not know.

That for over 40 years post registration, no claim has ever been brought by the respondents or their relatives that the appellants held a portion of the suit land in trust for them. That the respondents and their relatives came to the suit land after the 1st registration.

That the judgement was ambiguous and absurd. That the judgement directed that the suit parcel be surveyed and be subdivided yet no such prayer was ever made as the pleadings filed by the respondents were fundamentally defective. That the judgement will cause chaos.

Counsel urged the court to allow the appeal set aside the judgement of the trial court and grant the prayers sought for in the plaint with costs of the appeal.

On behalf of the respondents, no submissions were filed. Directions for filing of written submissions on the appeal were taken on 1st July, 2025, in the presence of both respondents.

Issues for determination

The grounds of appeal form the issues for determination herein.

Analysis and determination.

This is a first appeal. The principles guiding the handling of a first appeal are well settled. They are that the appellate court has a duty to consider the entire evidence produced before the trial court, re-evaluate it, and arrive at its own independent conclusion. While doing so, the court keeps in mind the fact that the trial court had the advantage, which the appellate court does not have, of seeing and hearing the parties and their witnesses first-hand. See *Gitobu Imanyara & 2 others -vs- Attorney General [2016] e KLR*, where it was held that:-

“Briefly put, they are that this court must 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 allowances in this respect”.

(Also see Selle & another vs Associated Motor Boat Company Ltd & Another (1968) IEA 123 and Peter M. Kariuki vs attorney General [2014]eKLR)

The first ground of appeal faults the trial court for failing to analyze and evaluate the evidence and submissions presented by the parties, and thus ended up reaching the wrong decision.

From the proceedings in the record of appeal, the evidence placed before the trial court, by the appellants, comprised the testimony of both appellants and the exhibits they produced.

The 1st appellant, who testified as PW1, adopted the contents of her witness statement as her evidence. She had stated in the witness statement dated 7th October, 2020, that she was the lawful wife and administrator of the estate of one Silvanus Ondiek Ouko, deceased, who owned the suit land.

That she took out Letters of Administration to the estate of her late husband. That her matrimonial home is on the suit land. That the defendants are strangers to her family. That sometime back the 1st defendant illegally and without any colour of right

trespassed onto the suit land and illegally constructed temporary structures. That it was the 1st defendant who invited the 2nd defendant to the suit land. That the 2nd defendant is the son of the 1st defendant. That the 2nd defendant also constructed temporary structures on the land.

That the appellants reported to the area Chief, who warned the respondents against the unlawful acts, but the respondents refused to stop. That they sought the advice of Counsel who wrote a demand letter to the respondents before the appellants filed the suit.

The 1st appellant produced exhibits as listed in her list of documents dated 7th October, 2020. These included a copy of title deed for the suit land dated 30th July, 2019, certificate of confirmation of Grant dated 29th April, 2019 bequeathing the suit land to the 1st appellant and certificate of official search dated 25th August, 2020 showing that the suit land was registered in the name of the 1st Appellant and that there was a caution lodged by the 2nd respondent and one Caroline Atieno Owuor claiming beneficiary interest.

The 2nd appellant adopted the contents of his witness statement, reiterating the contents of the statement of the 1st appellant.

On cross-examination, the 2nd appellant stated that the 1st respondent's husband had come and inquired whether he could build a home on the suit land, and that the appellants had declined. He stated further that the respondents used to live on the land a long time ago, but that they left and went to Migori.

On behalf of the respondents, the record shows that the 1st respondent testified as DW1 and stated that when she got married in the year 1982 to Charles Otieno who was the son of one Dalmas Gwara, she found her father-in-law on the suit land. That her father-in-law later passed on and left her on the land and that is the parcel of land where she stays to date.

On cross-examination, she stated that the 1st appellant is her mother-in-law.

That her father-in-law was working elsewhere when the land was registered. That she started living on the parcel in the year 1982. That her father-in-law was not in a hurry to get title as there was a good relationship.

The 2nd respondent testified as DW2 and stated that the 1st respondent is his mother and that when he came of age, he found his parents living on the suit land.

He testified further that although they could leave the land briefly to go and visit their father, who was working in town, they would thereafter go back to the land. That his father and grandfather, who died were buried on the suit land.

On cross-examination, DW2 had stated that although they have no title to the suit land, it is their ancestral land. That Silvanus Ondiek was the one chosen to hold the land in trust for others.

DW3 one Michael Ochieng, a retired Assistant Chief, testified that when the land survey came, Gwara was away but Ondiek was present. That Gwara was to get a portion of the land. That when Gwara came back, and he got a portion of the land. That Ondiek died without having any issues, and that he never quarreled with Gwara. That the 1st respondent's husband was buried on the land, as was their grandmother. That the land was to be subdivided so that Gwara could get a share.

On cross-examination, DW3 stated that in 1994 he went to the land to rectify a boundary dispute. That Gwara was a brother to Ondiek and that when Gwara came back they stayed well and had no issues.

That the two were to share the land as brothers.

A reading of the judgement shows that the trial court summarized the evidence of each of these witnesses and proceeded to frame the issues for determination.

The court noted that it had been explained and demonstrated that the suit land was to be shared between two people; ONDIEKI and GWARA.

The court also noted the evidence that when demarcation of land was being done Gwara was away and that the whole land was registered in the name of ONDIEK who was the one present at home.

The trial court then after citing case law proceeded to find that it was clear that the land the subject matter was customary land in which one kin was registered as proprietor to hold in trust for the other kin who was away when the land adjudication process was being undertaken.

The trial court then proceeded to allow the respondent's counterclaim and make orders accordingly.

Did the trial court err in doing this?

The appellants referred the court to the case of Isaak Kieba M'inanga vs Isaaya Theuri M'Linturi and Another, where the Supreme Court highlighted the elements of a customary trust as: -

- a. the land in question was before registration, family, clan or group land.
- b. the claimant belongs to such family, clan or group.
- c. 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.
- d. the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
- e. the claim is directed against the registered proprietor who is a member of the family, clan or group.

I have also seen the decisions in Ngugi Kamau and Another (Environment and Land case no 36 of 2020) [2022] KEELC 2261 (KLR and Juletabi African Adventure Limited and Another vs Christopher Michael Lockley [2017] eKLR where it was held that the burden of proof lay with the party relying on the existence of a trust to prove the existence thereof. That to discharge the burden of the existence of a customary trust the claimant must prove that;

- a. The suit property was ancestral or clan land.

- b. During adjudication and consolidation one member of the family was designated to hold on behalf of the family.

Looking at the evidence in the present case, these elements were manifest and proved on a balance of probabilities.

Although the appellants claimed that the respondents were strangers to them, the evidence placed before court by the respondents was overwhelming as to the relationship existing between the two families.

The respondents' presence on the suit land was not contested. While the appellants pleaded in the plaint that the respondents entered the suit land in the year 2020, the evidence placed before the trial court was that the respondents had been on the suit land for a long time. They have their homes thereon. The 1st Respondent's evidence was that she started living on the land in the year 1982 when she got married to the family of Dalmas Gwara, who was the father of her husband.

In their evidence, the appellants were silent on the date of entry of the respondents onto the suit land. But the 2nd appellant stated on cross-examination that the respondents used to live on the land a long time ago but left and went to Migori.

The appellants admitted that both respondents have structures on the land. The respondents testified that they have their homes on the land because the land was their ancestral home.

Although the appellants denied any relationship with the respondent, the evidence that emerged was that the parties were related and that it was on the basis of the relationship that the respondents were in occupation of the land.

DW3 testified to the existence of a boundary between the portions of land and stated that in 1994, he was invited as the area Assistant Chief to settle a small boundary dispute that had developed between the two families.

Customary trusts are overriding interests under the provisions of Section 28 (b) of the Land Registration Act to which all registered land is subject. Hence, the title obtained by the 1st Appellant upon succession to the estate of the deceased was subject to the respondents' interest in the land.

For the foregoing reasons, I find that the trial court evaluated the evidence placed before it correctly and did not err in its findings.

The second ground of appeal faults the trial court for making a finding in favour of the respondents' despite the evidence and the fact that the counterclaim was fundamentally and incurably

defective for reasons that it was not accompanied with a verifying affidavit as required by law.

The law in Order 7 Rule 5 of the Civil Procedure Act requires that the defence and counterclaim be accompanied by, among other documents, an Affidavit under Order 4 Rule 1(2) where there is a counterclaim. Order 4 rule 1(2) requires such an Affidavit to be sworn by the plaintiff (in the counterclaim in this case), verifying the correctness of the averments of the contents of the plaint/counterclaim.

I have perused the record, and indeed, the defence and counterclaim filed by the respondents had no Verifying Affidavit accompanying it.

I have also noted from the record that the appellants did in paragraph 9 of their defence to counterclaim dated 3rd July, 2021, plead that the counterclaim was incurably defective for lack of verification of the averments contained therein and ought to be struck out.

There is no evidence of any steps taken by the respondents who were acting in person to have the Verifying Affidavit filed.

There is also no evidence that the appellants took up the issue as a preliminary issue for determination before the hearing of the

suit. The matter therefore proceeded to hearing and determination. The trial court pronounced itself on the rights of the parties in the suit on the basis, inter alia, of the counterclaim. Courts have pronounced themselves on the status of a counterclaim which is not accompanied by a Verifying Affidavit. For instance, in Jefitha Muchai Mwai v Peter Wangio Thuku [2015] eKLR , it was held that;

“It is of course instructive to note as conceded by the Appellant that the rules now have been amended through legal notice No. 151 of 10th September, 2010. Under Order 4 Rule 2(5) and Order 7 Rule 5 (a) of the Civil Procedure Rules, a counter-claim now must be accompanied by a verifying affidavit....In any event courts of law in the spirit of Article 159 of the Constitution should try as much as possible to sustain causes in court rather than striking out suits for reasons that are merely technical and curable by a simple step that does not prejudice the other party. If a party inadvertently leaves out a verifying affidavit or any other document like a statement, he/she could be given a chance to file one and the matter can proceed

for determination on merit. If the other party is affected by the attendant delay appropriate costs should adequately address the problem.”

And in Michael Muuthoka Makau (suing as personal representative of the Estate of Ernest Daudi (deceased) v Simon Nganga Mbugua & Another, (2018) eKLR a preliminary objection was raised that a defence and counterclaim was not supported by a Verifying Affidavit. The court, after reviewing various authorities, declined to strike out the defence and counterclaim.

Considering the provisions of Article 159 of the Constitution, case law cited, the fact that the respondents were unrepresented, and the fact that the appellants did not take up the issue as a preliminary issue, I find that the trial court did not err in proceeding the way it did.

The third ground of appeal is related to ground one as it faults the trial court for failing to find that the appellants had proved a *prima facie* case in view of the evidence produced and that the Appellants are beneficiaries of the 1st registered owner of the suit land who had an indefeasible title under the law. This has been covered in the determination of ground 1.

Ground 4 of the appeal faults the court for relying on a Chief's letter which was not part of the court record.

Perusal of the judgment shows that on page 6 thereof, the court referred to a letter by Senior Chief dated 5th February, 2018. The court noted that the maker of the letter had not been called as a witness, but proceeded to rely on the same. The trial court held that the letter was official communication coming from a public servant.

It is clear that the letter was not one of the exhibits produced in the case, hence not part of the court record. It was erroneous for the trial court to rely on the same.

However, be that as it may, the conclusion that the trial court came to on the basis of the letter, namely that the suit land was ancestral land and that the Gwara family (the respondents' family) had a right to get their portion thereof was not erroneous as the same was supported by the evidence produced by the respondents and particularly the testimony of DW3.

The 5th ground of appeal is also related to the 1st ground of appeal already determined hereinabove, as it challenges the court's finding that the respondents' claim based on a customary trust was valid. This also applies to grounds 6 and 7 of the appeal.

Ground 8 of the appeal is to the effect that the decision of the Magistrate was ambiguous and absurd because it directed the Land Registrar to survey and sub-divide the land, yet the respondents had not stated the acreage of the land they have been occupying, and that the decision will fuel the dispute instead of settling it.

The decision of the trial court was that the suit was dismissed and the counterclaim allowed. The counterclaim sought for an order that the District Land Registrar & Surveyor Kisumu County do visit land parcel No.KISUMU/KAPUONJA/25, have it surveyed and the portion currently occupied by the defendants (the respondents herein) be registered in their names upon payment of the requisite official fees.

The orders in the judgment were partly that: -

“Let the Land Registrar Kisumu and Land Surveyor Kisumu visit the disputed land and curve out the plaintiffs’ portion as it is on the ground, and also the defendants’ portion as it is on the ground.

The Land Registrar to issue two title deeds; one in the name of the 1st plaintiff to hold in trust for herself and her

family and another in the name of the 1st defendant to hold in trust for herself and her family.

Both sides to share the costs of the survey and other related expenses equally.”

Although the appellants submitted that the judgment was ambiguous and absurd, this was not demonstrated. A reading of the judgment shows that the orders of the trial court were clear and implementable.

The last ground of appeal relates to the submissions filed by the appellants. The appellants faulted the trial court for treating the submissions in a casual and cavalier manner thus occasioning a miscarriage of justice.

Again, it was not pointed out what aspect of the Appellants’ submissions the trial court failed to take into account and what miscarriage of justice ensued.

The record shows that the trial court, in its judgement referred to the submissions filed.

The respondents in paragraph 16 of the defence and counterclaim pleaded that the appellants’ suit was statutorily time-barred and should be dismissed.

Considering the time the respondents entered onto the suit land, the appellants' claim was time-barred under the provisions of Section 7 of the Limitation Act.

Having re-examined the evidence placed before the trial court and the case law relied on by the trial court, I find that the trial court did not err in finding that the suit land was subject to a customary trust and in finding in favour of the respondents.

I find no reason to interfere with the decision of the trial court.

The appeal is hereby dismissed and as the parties are related and will probably be pursuing the sub-division and transfer of the suit land, I direct each party to bear its own costs of the appeal.

Orders accordingly.

Judgment dated and signed at Kisumu and delivered virtually this 19th day of February, 2026.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen: Court Assistant.

Odhiambo Gwada for the appellants.

2nd respondent present in person.