



**Kikopi & another v Mkalla (Civil Appeal E037 of 2022)
[2025] KECA 751 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KECA 751 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E037 OF 2022
KI LAIBUTA, LA ACHODE & GWN MACHARIA, JJA
MAY 9, 2025**

BETWEEN

KAVIHA KIKOPI 1ST APPELLANT

STEMBO KAVIHA KIKOPI 2ND APPELLANT

AND

NATHAN MKALLA RESPONDENT

(Being an appeal from the Judgement and Decree of the Environment & Land Court of Kenya at Malindi (Odeny, J.) delivered on 28th June 2022) in ELC No. 83 of 2016)

JUDGMENT

1. The proceedings before the Environmental and Land Court (ELC, in ELC Case No. 83 of 2026 were commenced by the respondent, Nathan Mkalla, against the appellants, Kaviha Kikopi and Stembo Kaviha Kikopi. The central issue in dispute was the ownership of unregistered portion of land measuring 3 acres at Sabaki sub-location in Malindi sub- county in Kilifi County (the suit portion).
2. The respondent pleaded that he was the beneficial owner of the suit portion which borders the land of the Kikopi family to the North, Ton Saba to the East, Magaba to the West and Stembo, Philip and Ngala to the South. He averred that he purchased the suit portion from one MT (the deceased), who was a member of the Kikopi family, and that the entire Kikopi family as well as the appellant were aware of this fact.
3. According to the respondent, his neighbours, Stempo and Philip were carrying out excavation of murrum and hardcore on their portions of land but, upon exhaustion, they approached him to sell to them the suit portion which he declined; that soon thereafter, the 2nd appellant demanded to have sale agreement between him (the respondent) and the deceased, which was publicly displayed to the satisfaction of everyone present; that, on 1st April 2016, the 2nd appellant brought a quarrying company



- which started excavating the suit portion without express authority from him; and that the appellants' actions were causing him loss by, not only removing the substratum and changing the character of the suit portion, but that they were also pocketing money from the quarrying activities to his detriment.
4. The respondent averred that, he had suffered loss and damage as a result of the appellants' actions which he lay claim on, being the money earned from the quarry; a declaration that the 3 acres of the suit portion belongs to him; a permanent injunction restraining the appellants from interfering with his enjoyment of the suit portion; mesne profit on account of the excavated material to be assessed by the court; costs of the suit; and interest.
 5. In their Statement of Defence dated 3rd May 2016, the appellants averred that the suit property measuring 20 acres or thereabouts was owned by their family, and that it was their ancestral farmland, which they had utilized to the exclusion of the respondent; that the agreement for sale between the respondent and the deceased did not confer or pass title or interests in the suit portion to the respondent for the reasons that, at the time of the alleged sale, the deceased was not the owner of the suit portion; and that, furthermore, they objected to the purported sale of the suit portion on 28th February 2016.
 6. The appellants denied: that they ever approached the respondent with the proposition to purchase the suit portion from him, but that, instead, it is the respondent who offered them KShs.10,000 as an inducement for them to abandon the suit portion; that they are causing loss and damage to the respondent or the suit property since the respondent cannot suffer loss or damage for property he has no rights over whatsoever; and that the respondent was not entitled to the prayers sought in the plaint. To them, the suit was misconceived. They prayed that it be dismissed with costs.
 7. The suit proceeded by way of viva voce evidence. The respondent testified as PW1. He reiterated that he purchased the suit property on 5th December 2009 from the deceased under a sale agreement for a consideration of KShs.100,000; that he uses the suit portion for farming; that he had built his home thereon; and that the larger Kokopi family had no objection to his purchase of the land and settling on it.
 8. In cross examination, he stated that he was informed by his wife that the deceased was selling the suit portion; that he then approached the deceased as an interested buyer; that the deceased showed him the boundaries that marked the suit portion, and that they signed a sale agreement; that he then built a house on the suit portion and his wife resided thereon for three years; that the house was made of mud and makuti (grass) but that it later collapsed; that the appellants do not stay anywhere near the suit portion; and that the deceased had no alternative land that he could have sold to him other than the 3 acres comprising the suit portion.
 9. Mwambao MT (PW2), the deceased's child, testified that the deceased sold the suit portion to the respondent; that the 1st appellant is the younger uncle to his late father while the 2nd appellant is a son to the 1st appellant; and that the dispute started when the 1st appellant came to excavate murrum.
 10. In cross examination, PW2 stated that he lived some 3 kilometres from the disputed suit portion with his mother; that the suit portion was given to his father as his share by the 1st appellant and his brother, Hanga Kikopi, sometime around the year 2009; that Hanga Kikopi was his father's father; that he knew that some of his brothers signed the sale agreement, but that he was not present on the material day; and that it was true that the respondent built a house on the suit portion.
 11. Jumwa Mrama Taura (PW3), the deceased's wife, testified that she knew that her husband sold the land to one Mkalla. In cross examination, she stated that, when she got married, she used to go to the land to farm; that the 1st appellant was also informally tilling the land; that the deceased later encountered



- some problems, and that is then that he expressed his desire to sell his portion; and that he told the 1st appellant about his wish, and that she consented to the land being sold.
12. In his defence, the 1st appellant testified as DW1. It was his testimony that the deceased was a son to his brother, one Hanga; that the entire family land measured 20 acres and belonged to him; that he only allowed the deceased to use a portion of it for purposes of cultivation; and that the deceased started using the land on behalf of his father. He denied seeing anything to show that the land had been sold to the respondent; that his brother never informed him that the deceased had sold his land; and that he has never consented to the sale of the land.
 13. DW2, Stembo Kaviha Kikopi, testified that the deceased was his cousin; that the entire family land was left to his father, the 1st appellant, after their grandmother died; that the deceased had not told anyone that the land had been sold; that it is the respondent who offered them Kshs.10,000 for them to surrender the land; and that they (as a family) realised that there was someone living on the suit portion after they saw a makuti (grass-thatched) structure.
 14. Juma Hanga (DW3), the deceased's mother, testified that the suit portion belonged to the 1st appellant's mother; that they were given the suit portion by the 1st appellant; that the deceased was sick, and that he sold the suit portion without telling anyone; and that, when he saw the house structure on the suit portion, he thought that the appellants built it so as to shield themselves from adverse weather conditions.
 15. On his part, Pola Mjoe (DW4) basically testified that the suit portion belonged to the 1st appellant after acquiring it from his mother.
 16. Upon conclusion of the trial, judgment was entered in favour of the respondent on 28th June 2022. The learned Judge (Odeny, J.) held that the appellants did not dispute the existence of a sale agreement between the respondent and the deceased; that their contestation was that the deceased had just been allowed to till the suit portion by the Kikopi family; and that, consequently, he did not have a good title to pass.
 17. The trial court opined that, since the suit portion was unregistered, and in the absence of a title deed, it could only rely on oral evidence together with the documentary evidence available, being the sale agreement and the payment schedule, to make a finding on whether the respondent legitimately owned the suit portion. It was held that the 1st appellant's claim that the entire land belonged to him was not substantiated; that the sale agreement was signed by 8 people who appended their signatures together with their national identity cards; that PW3 and her deceased husband informed the 1st appellant of their intention to sell the suit portion in order to raise money to take care of their personal issues; that, upon purchase of the suit portion, the respondent built a temporary house; and that DW3 did not bother to find out who lived therein.
 18. On the issue of mesne profits, the Judge held that mesne profits are special damages which must be specifically pleaded and strictly proved; that the respondent did not lead evidence to prove the mesne profits; and, consequently, this claim was dismissed.
 19. In the end, the trial court was persuaded that the sale agreement together with the payment schedule produced by the respondent proved his case on a balance of probabilities as far as ownership of the suit portion was concerned. The respondent was granted orders of permanent injunction restraining the appellants from interfering with the suit portion or from further excavating the murram on the suit portion plus costs of the suit.



20. Dissatisfied with the trial court's Judgment, the appellants lodged this appeal raising 3 grounds of appeal. They fault the learned judge for:
 - a. Failing to appreciate the evidence adduced, and, as a result, arrived at a wrong decision;
 - b. Finding that the evidence adduced had proved that the suit land belonged to the vendor at the time the vendor sold it to the respondent; and
 - c. Finding that the suit land belonged to the 1st respondent only and not to the entire Kikopi family, and that the vendor had no interest or title in the suit land capable of being sold or passed to the respondent.
21. We heard this appeal virtually on 12th November 2024. Learned counsel Mr. Shujaa appeared for the appellants while learned counsel Mr. Omagwa Angima appeared for the respondent. Mr. Shujaa entirely relied on the appellants' written submissions dated 30th October 2024. On his part, Mr. Omwaga Angima highlighted the respondent's submissions dated 6th November 2024.
22. The appellants condensed the three grounds of appeal into one, namely that the learned Judge erred in law and in fact in failing to properly analyse the evidence adduced and, as a result, arrived at a wrong decision. They submitted that it is not disputed that they and the deceased are members of the same family, but that there was no evidence that the suit portion was initially part of the Kikopi family's property before the deceased purported to sell it; and that no member of the Kikopi family was called to witness the sale agreement; that, from the evidence of PW3, the suit portion did not belong to the deceased as at the time of sale to the respondent; and that, although PW3 found the deceased tilling the land when she got married into the Kikopi family, he (the deceased) had been informally given the land to till so much so that he had not powers or right to sell it.
23. The appellants contended that the evidence adduced pointed to the fact that the suit portion solely belonged to the 1st appellant; that the evidence of DW3, the deceased's mother, was that the suit portion did not belong to her, but to the 1st appellant who allowed the deceased's father to cultivate it on a temporary basis; and that the deceased was not given the suit portion as his share from the larger Kikopi family land.
24. According to the appellants, at paragraph 79 of the judgement, the learned Judge acknowledged the fact that the 1st appellant allowed the respondent to use the suit portion; that if then the suit portion was owned exclusively by the deceased, it beat logic why the deceased and his wife, PW3, would inform and/or ask the 1st appellant that they needed to sell the land so that they could get money for medical treatment; that the fact that the deceased had to seek and obtain the 1st appellant's consent to sell the land, but not his father's, is a pointer that the suit portion belonged to the 1st appellant; that the primary issue was not whether the respondent had a written agreement for sale, but, rather, whether the vendor had proprietary or beneficial interest in the suit portion which he sold to the respondent.
25. In conclusion, the appellants contended that there was no evidence establishing an unbroken chain of ownership of the suit property starting from the 1st appellant and ending with the deceased's ownership. It was their case, therefore, that the respondent had failed to discharge his burden of proof that he indeed owned the suit portion as required by sections 107, 108 and 109 of the [Evidence Act](#).
26. Opposing the appeal, Mr. Angima submitted that, contrary to the appellants' assertion, the learned Judge considered all



the evidence adduced before her before arriving at a balanced decision; that the respondent lawfully purchased the suit portion from the deceased by virtue of a sale agreement signed in the presence of eight witnesses; and that, before he purchased the land, the respondent consulted the deceased's family which now wants the sale to be set aside despite having received Kshs.100,000 as consideration.

27. Counsel invited us to consider the applicability of the principles of equity and fairness in line with national values as postulated in Article 10(1) (b) of *the Constitution* and this Court's decision in the case of Willy Kimutai vs. Michael Kibet (2018) eKLR; that the appellants only started challenging the sale of the suit portion to the respondent after they realised that the respondent's land had murram that could be excavated; and that, accordingly, the appeal should be dismissed with costs.
28. This is a first appeal. In line with our mandate as the first appellate court, we are called upon to re-analyse, re-evaluate, weigh and interrogate all the evidence on record afresh and arrive at our own independent conclusions. In doing so, we should bear in mind that we are handicapped by the fact that we did not have the advantage of hearing, seeing and observing the witnesses as they testified and possibly assess their demeanour, for which we should give due allowance. This was the finding of this Court in Bruce Joseph Bockle vs. Coquero Limited (2014) KECA 682 (KLR) which expressed itself thus:

“Over the years, there has developed a practice which has since acquired the force of law that the first appellate Court in dealing with first appeals, transforms itself into the trial court however without the benefit of seeing and hearing the witnesses as the trial court, interrogate and re-evaluate the evidence afresh so as to reach its independent conclusion as to whether to sustain or overturn the trial court's judgment. In other words, as a first appellate court in this appeal we are expected to approach the whole of the evidence on record from a fresh perspective and open mind.”

29. In the case of *Selle vs. Associated Motor Boat Co. Ltd* [1968] EA 123, the duty of a first appellate court was also aptly stated as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. 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 allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif -v - Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270).”

30. Having considered the record of appeal and the respective rival submissions of both parties, it is our view that the appeal stands or falls on our finding on one issue, namely whether from the evidence adduced, who as between the 1st appellant and the respondent is the lawful owner of the suit portion.
31. It is common ground that the respondent's acquisition of the suit portion was by dint of a sale agreement dated 5th December 2009. It is also common ground that the whole of the suit property in question is unregistered.
32. Evidence of ownership of land is through a Title Deed, ea Certificate of Title or a Lease granted by the Land Registrar upon registration. Section 26(1) of the *Land Registration Act*, 2012 affirms



the sanctity and indefeasibility of title with the exception of cases disclosing involvement of fraud, misrepresentation or other unlawful conduct in its acquisition. It provides thus:

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.
33. As already noted, the disputed suit portion is unregistered. The 1st appellant claims ownership of the whole of the Kikopi family land by virtue of inheritance from his deceased grandmother. On the other hand, the respondent's claim, constituting 3 acres out of the Kikopi family land, being the suit portion, was through a sale agreement dated 5th December 2009 between himself and the deceased. The consideration was Kshs.100,000. In addition to the sale agreement, the respondent further produced a schedule of payment resting with the final instalment of Kshs.20,000 on 8th November 2015, which the deceased's son (PW2) acknowledged receiving.
34. Faced with the tough hurdle of not having the benefit of a Certificate of Title before her, the learned Judge heavily relied on the contents of the sale agreement which we have also perused and appreciated. The learned Authors Kevin Gray and Susan Francis Gray on Elements of Land Law, 5th Edition outlined the principles that apply to evidence of title in respect of unregistered land as follows:
- “Evidence of title to an unregistered estate in land usually exists only in the form of a chain of documentary records (or title deeds) which detail successive transactions with that land over the course of time. These historic documents of title (or 'deeds bundles') are privately controlled, being retained normally within the custody of the proprietor of the estate to which they relate. These deeds provide the 'essential indicia of title' since the information contained in them, when coupled with the fact of undisturbed possession, generally identifies the person who currently has the best 'title' to any relevant estate in the land. Title to an estate can also be claimed, however, by one who holds no supporting documentary evidence but relies instead on the sheer fact of his own possession.”
35. We appreciate that the burden of proof in accordance with section 107 of the *Evidence Act* lies with the person who desires to have any court give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The Supreme Court in *Odinga & Another vs. Independent Electoral and Boundaries Commission & 2 Others* [2017] KESC 39 (KLR) 27 August 2017 held as follows on the evidential burden of proof:
- “Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and 'remains constant through a trial with the plaintiff, however, 'depending on the effectiveness with which he or she discharges this, the evidential



burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”

36. This Court had this to say regarding proof of ownership of an unregistered parcel of land in *Mariam Fadhili vs. Samson Maricho Otweyo & 3 Others* (2016) KECA 249 (KLR):

“In our view, in the absence of registration as aforesaid, in order to determine the rightful proprietor of the suit land, the matter was left to the realm of the law of contract. Since these are competing interests, it was for each party to prove validity and priority of their title.”

37. It is worth noting that the appellants do not challenge the authenticity of the sale agreement. Neither did they challenge the fact that the deceased received the monies paid in consideration for the sale. They do not impugn the sale agreement on grounds of fraud. For all intent and purposes, since the land was unregistered, there was nothing else other than the sale agreement, the payment schedule and the witnesses’ testimonies that the learned Judge could rely on as a testament that the respondent had purchased the suit portion from the deceased. It is for this reason that we find that the respondent ably discharged the burden of providing the requisite evidence that he legally acquired the suit portion. His evidence regarding the circumstances which led to his acquisition of the suit portion was not only consistent, but was also corroborated by his witnesses. His claim of ownership to the land has a chain of history which was unbroken. To the contrary, the 1st appellant who also claimed ownership of the suit portion did not provide an iota of evidence to prove such ownership. This finding extends to both appellants who, in our view, have not disproved the respondent’s claim that he legitimately owns the suit portion.

38. Further, we note that the photographs produced by the respondent, namely the fallen semi-permanent house structure and the quarrying activities on the suit portion, depict his true account of events that the semi-permanent home eventually dissipated leading to his wife leaving the suit portion, and that the appellants had begun excavating murrum thereon.

39. The dispute arose in the year 2016, some 7 years after the appellant purchased the suit portion in the year 2009. When it became apparent to the appellants that they could obtain some monetary benefits from excavation of murrum from the suit portion, they sought to disrupt the respondent’s peaceful and quiet possession thereof. We are highly sceptical that, for 7 years, the appellants were ignorant of the respondent’s existence on the suit portion. They merely assert that the 1st appellant gave the deceased permission to cultivate on the suit portion, which to us is a second thought that is founded on no evidence. In the circumstances, we cannot help but conclude that the appellants’ appetite for the respondent’s land was actuated by thirst to make money.

40. In view of the foregoing, we arrive at the inescapable conclusion that the learned Judge did not err in finding that the respondent properly discharged his burden of proof of ownership of the suit portion to the required standard, namely on a balance of probabilities. The evidence adduced by the respondent clearly demonstrated that he purchased the suit portion and settled his part of the bargain by paying the full consideration. In contrast, the appellants’ patched up evidence did not dislodge the respondent’s evidence.

41. In the end, we find that the appeal is unmeritorious. It is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF MAY, 2025.

DR. K. I. LAIBUTA CARB, FCIARB.

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

G. W. NGENYE MACHARIA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

