



**Mbasa v Mbasa & another (Civil Appeal E034 of 2021)
[2025] KECA 1420 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1420 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL E034 OF 2021
MSA MAKHANDIA, HA OMONDI & AO MUCHELULE, JJA
JULY 31, 2025**

BETWEEN

PATRICK MBASA APPELLANT

AND

MESHACK ODHIAMBO MBASA 1ST RESPONDENT

PERCY OWINO OCHIENG 2ND RESPONDENT

*(Being an appeal from the Judgment of the Environment and Land Court at
Kisumu, (Ombwayo J.) dated 10th December, 2020 in Kisumu ELC No. 50 of 2019)*

JUDGMENT

1. This is an appeal from the judgment and decree of the Environment and Land Court of Kenya at Kisumu, ("the ELC"), (Ombwayo. J.), delivered on 10th December 2020 in Kisumu HC ELC Appeal No. 50 of 2019.
2. By that judgment and decree, the ELC upheld the decision of the Principal Magistrate's Court at Siaya in ELC Case No. 53 of 2018, "the trial court" and thereby dismissed the appeal.

The dispute leading to this second appeal revolves around the ownership of land parcel LR No. EAST GEM/RAMULA/874, ("the suit property"), which was transferred and registered in the names of the 1st and 2nd Respondents (Meshack Odhiambo Mbasa and Percy K'Owino Ochieng) respectively by their father, Charles Rosa Mbasa, ("the deceased") before his demise. The appellant, Patrick Mbasa, who is the last-born son of the deceased, refused to vacate the suit property and move to the parcel he had been bequeathed by the deceased elsewhere, claiming that it was ancestral land and that the respondents held it in trust for him.
3. Following this stalemate, the respondents initiated a suit in the Principal Magistrate's Court at Siaya seeking possession of the suit property, eviction therefrom of the appellant, and a permanent



injunction against the appellant. The respondents averred that the suit property had been lawfully transferred to them by the deceased following a family meeting to bequeath his estate among his children. He accordingly bequeathed LR No. 510 to the appellant and his brother Derick Mbaso. On the other hand, the suit property was bequeathed to the respondents. However, the appellant failed to attend the meeting and refused to provide the necessary documents for the registration of the parcel of land assigned to him. Instead, he continued residing on the suit property, blocked access paths, and commenced developments on thereon.

4. During the hearing, the respondents presented documentary evidence, including minutes of a family meeting, showing that the deceased had given landed property to each of his children; and had in fact stopped the appellant from claiming any interest in the suit property. They also produced court orders obtained by the deceased against the appellant, preventing him from interfering with the suit property. They maintained that the appellant's occupation of the suit property was not adverse, as he had been expressly prohibited from residing thereon by the deceased. They stated further that the appellant had no legal claim to the suit property and was therefore wrongfully occupying it despite being allocated LR No. 510.
5. It was respondents' case that the deceased had purchased the suit property and built his home thereon, making it his personal property rather than ancestral land. They emphasized that the deceased had transferred the suit property to them voluntarily, and they had lawfully obtained title for the same in their names on 25th June 2015.
6. Based on their evidence and undisputed facts, the respondents sought a court declaration confirming their ownership of the suit property, an order directing the eviction of the appellant, and permanently restraining him from interfering with the suit property. They countered the appellant's counterclaim to the suit property in which he asserted that the suit property was held in trust for him, as baseless, having failed to prove the existence of a trust or any customary entitlement to the same. Neither could the appellant's counterclaim be anchored on adverse possession. In the end they urged the court to dismiss the counterclaim and grant them full possession of the suit property.
7. The appellant, filed a defence and counterclaim dated 25th July 2016, later amended on 14th December 2017, arguing that the suit property was ancestral land and that the respondents held it in trust for him. He contended that, as the last-born son, he was entitled under Luo customary law to remain in his father's homestead and that the respondents had wrongfully and fraudulently obtained title to the suit property.
8. The appellant claimed that his continuous occupation of the suit property since 1975 gave him legal rights over it. He further argued that the respondents' suit was statutorily time-barred, as he had been in uninterrupted possession of the suit property for decades. He by way of counterclaim sought a declaration that the respondents held the suit property in trust for him, an order canceling their registration, and a directive requiring them to transfer the suit property to him. He also requested that the Deputy Registrar of the Court execute transfer documents in his favour should the respondents fail to do so.
9. During the oral hearing, the appellant testified that he had lived on the suit property since birth, and had constructed a house thereon. He denied knowledge of the family meeting where his father allegedly bequeathed his estate among his children, stating that he had never been given LR No. 510. He insisted that the suit property was ancestral land, and he had a customary right to remain on it.
10. The appellant also challenged the court orders issued against him, arguing that they were obtained exparte and that the deceased had no right to restrain him from the suit property. He maintained that



- the respondents had no valid claim to the suit property and that their title was obtained improperly and fraudulently.
11. Ultimately, the appellant sought for the dismissal of the respondents' suit with costs and entry of the judgment in terms of the counterclaim.
 12. The trial court in its judgment found that the respondents were the lawful registered proprietors of the suit property, having obtained title to it on 25th June 2015; and pursuant to Section 24(a) of the *Land Registration Act*, the respondents' title was indefeasible, subject only to trusts, fraud, or misrepresentation, none of which were proved by the appellant; that no evidence was presented to establish the existence of a customary trust in favour of the appellant; that trusts must be proved by evidence, citing the case of *Wambugu v. Kimani* [1992] 2KAR 58, in support of the proposition; that the appellant had failed to provide any documentation or testimony proving that the suit property was ancestral land or that the respondents were holding it in trust for him.
 13. On adverse possession the ELC noted that the earliest point at which the appellant's occupation could be considered adverse was 25th June 2015, when the respondents were registered as proprietors of the suit property. Since this was well within the 12-year limitation period under Section 13 of the *Limitation of Actions Act*, the trial court held that the appellant's claim of adverse possession was premature; it also determined that the appellant had no legal right to remain on the suit property, as the deceased had allocated him LR No. 510 in a family meeting.
 14. Based on these findings, the trial court granted possession of the suit property to the respondents, ordered the appellant to vacate the suit property within 45 days, issued a permanent injunction restraining him from interfering with the suit property. The appellant's counterclaim was consequently, dismissed with costs. These conclusions formed the basis of the appellant's appeal to the High Court. The appellant filed a Memorandum of Appeal dated 26th November 2019 in the ELC at Kisumu, complaining that the trial court erred in law and fact in delivering a fatally defective judgment, dismissing the appellant's counterclaim, while there existed a trust relationship between the appellant and the respondents; allowed the respondents' case, despite overwhelming evidence that their claim was statutorily time-barred; for holding that the existence of a trust had not been proved, and for determining that the appellant was entitled to LR No. 510, which was registered in the name of a person who was not a party to the proceedings. The appellant also argued that the trial court erred in finding in favour of the respondents and disallowing the counterclaim, contrary to the weight of evidence on record, and that the decision was against the evidence presented.
 15. The ELC upon hearing the appeal upheld the trial court's decision, thereby dismissing the appeal in its entirety. In doing so it reiterated and confirmed the findings of the trial court.
 16. Dissatisfied, the appellant filed a second appeal to this Court, on the grounds that the ELC erred in law and fact in failing to find that the respondents' claim was statutorily time-barred, in holding that LR No. 510 was ancestral land allocated to the appellant and his brother; in holding that he had not proved the existence of a trust; in dismissing his appeal despite overwhelming evidence on record; and in making an order for costs against him despite the family relationship between the parties.
 17. When the appeal came up for hearing, Mr. Lore, learned counsel appeared holding brief for K'Owino advocate for the appellant whilst Mr. Sala Jared, learned counsel, appeared for the respondents. Both parties chose to solely rely on their respective written submissions in canvassing the appeal.
 18. Counsel for the appellant submitted that the two courts below erred in their analysis of the evidence, leading to wrong conclusions on the principles of customary trust and adverse possession. Counsel



- argued that the two courts below failed to properly evaluate the testimony and documentary evidence, resulting in misinterpretation of key legal principles.
19. Counsel contended that the two courts below ignored the testimony of the 1st respondent, who admitted that under Luo customary law, the last-born son remains in the homestead. He submitted that his occupation of the suit property was therefore in accordance with Luo customs, and that he had established his home on the suit property with the knowledge and approval of his deceased father. He argued that the two courts below wrongly disregarded the existence of a customary trust, despite clear evidence that the suit property was treated as ancestral property. He further relied on the decision of the Supreme Court of Kenya in *Isack M’Inanga Kiebia v Isaaya Theuri M’Lintari & Another* [2018] eKLR, where the court outlined the requirements for establishing customary trust, asserting that the appellant had fulfilled those conditions.
 20. Regarding adverse possession, counsel submitted that the two courts below erred in determining that adverse possession commenced on 25th June 2015, when the respondents were registered as proprietors of the suit property. He argued that adverse possession runs against the title and is not affected by new registration, and that the appellant had peacefully occupied the suit property since the year 2000. He maintained that the respondents’ claim to the suit property had been extinguished, as the appellant had satisfied the legal requirements for adverse possession. to be inferred. He further pointed to admissions by the respondents, confirming that the appellant’s occupation of the suit property began between 2000 and 2002, thereby meeting the 12-year legal threshold.
 21. Counsel also submitted that the two courts wrongly shifted the burden of proof to him, requiring him to prove that LR No. 510 was not ancestral land, despite the 1st respondent’s admission that the land had been transferred to another party. He argued further that the two courts failed to consider the respondents’ lack of documentary evidence proving that this parcel of land was ancestral land, and that the said courts wrongly assumed that he was entitled to that parcel of land. Additionally, he contended that the said courts erred in dismissing his argument on protection of title, failing to recognize that title can be extinguished through adverse possession.
 22. In conclusion, Mr. Lore, urged this Court to allow the appeal, set aside the judgments of the two courts, and declare the appellant the rightful owner of the suit property on account of either customary trust or by virtue of adverse possession.
 23. The appeal was opposed by the respondents who contended that the two courts below correctly found in their favour and properly dismissed the first appeal.
 24. Mr. Sala submitted that the burden of proving the existence of a trust lay squarely on the appellant, and that he had failed to discharge this burden. He relied on the case of *Juletabi African Adventure Limited & Another v Christopher Michael Lockley* [2017] eKLR, in which it was held that a trust must be proved through evidence and cannot be implied or presumed without clear intention. Counsel further cited the case of *Isack M’inanga Kiebia v Isaaya Theuri M’Lintari & Another* (supra), where the Supreme Court outlined the elements required to establish a customary trust, arguing that the appellant failed to meet the criteria. He emphasized that minutes of the family meeting and other documentary evidence demonstrated that the suit property was not ancestral land, but rather the personal property of the deceased who had bought it and, had intended to transfer it to the respondents as absolute proprietors.
 25. Counsel further submitted that Section 26 of the *Land Registration Act* provides that a certificate of title is prima facie evidence of ownership, and that the appellant failed to prove that the respondents’ title was acquired fraudulently, illegally, or unprocedurally. He reiterated that the appellant’s claim based on adverse possession was premature, as the earliest point at which his occupation could be



considered adverse was 25th June 2015, when the respondents were registered as proprietors, and that this was well within the 12-year limitation period under Section 13 of the *Limitation of Actions Act*. In any event, Mr. Sala, submitted that the appellant had not pleaded the issue of adverse possession, rendering his claim legally untenable.

26. In conclusion, counsel submitted that the evidence overwhelmingly supported the dismissal of the appellant's counterclaim, and that the two courts below rightly granted prayers in favour of the respondents. Consequently, he urged this Court to dismiss the appeal with costs.

27. This is a second appeal. The jurisdiction of this court, as a second appellate court, is limited to consideration of matters of law. This Court set out such duty in the case of *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited* [2020] eKLR as follows:-

I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters that they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

28. This Court again stated in the case of *Kenya Breweries Ltd vs Godfrey Odoyo* [2010] eKLR as follows:-

First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See *Selle and Another vs Associated Motor Boat Company Limited and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

29. Likewise, the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR held that appellate courts in second appeals should only interrogate errors of law and should not disturb concurrent factual findings unless they are demonstrably perverse or irrational.

30. Upon review of the record, submissions, and the applicable law, the following issues of law emerge for our determination, whether the appellant: proved the existence of a customary trust over the suit property; established a claim of adverse possession over the suit property; and whether the two courts below properly applied the principles governing land ownership under the *Land Registration Act*.

31. On the first issue, Customary trust is a recognized legal principle, especially in cases where land is passed down through generational inheritance within communities. The Supreme Court of Kenya, in *Isack M'Inanga Kiebia* (supra), outlined four key elements necessary to establish a customary trust: the land must have been historically owned by the claimant's lineage or family, meaning it should have been passed down through generations as part of traditional inheritance; the claimant must prove that he was entitled to the land under customary law practices, demonstrating that he had a recognized right to possess or use the land according to communal traditions; Additionally, the registered owner must have acquired the land subject to the customary rights of others, meaning that even though they hold title to the land, they must have acknowledged the existing customary claims over it at the time of registration; lastly, the claimant must show continued occupation or possession consistent with the alleged trust, proving that his presence on the land has not been interrupted and aligns with the customary arrangement under which he claims ownership.

32. However, the burden of proving a customary trust falls on the party alleging it., as reaffirmed in the case of *Mbui Mukangu v Gerald Mutwiri Mbui* [2004] eKLR.



33. In the present appeal, the appellant relies on the argument that as the last-born son, he had an automatic right to remain in the homestead under Luo customary law, as the basis of his claim for customary trust. Given the legal framework, the question before this Court is whether the appellant met the evidentiary burden required to establish the existence of a customary trust. From the record, no supporting evidence such as testimony from elders from the Luo Community regarding this custom or generally about Luo customary trusts was tendered. It does not matter that the 1st respondent conceded that the appellant was the last born in their family. Secondly, there was evidence that the suit property was not ancestral land as the deceased had purchased it. This evidence was not rebutted at all by the appellant. If that be true then, that alone ousted the suit property from the armpit or regime of ancestral land that the appellant would have been entitled to inherit if at all there was such Luo custom. In our view therefore the appellant's claim did not satisfy the threshold set by judicial precedents already referred to. Consequently, the two courts below correctly dismissed the claim.
34. On Adverse Possession, the legal test requires actual adverse entry, open, continuous, and exclusive possession of land by the adverse possessor for a minimum of twelve years against the registered owner.
35. In the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, this Court stated that time starts running from the moment a proprietor is dispossessed of his land or when his title is challenged, rather than merely from the date of occupation. The respondents became registered proprietors on 25th June 2015. This suit was filed in 2018 hardly three years after the respondents had been registered as the proprietors of the suit property. In any event, time would not have started to run earlier as the appellant's occupation of the suit property was with the permission, consent or acquiescence of the deceased. The occupation before then was therefore not adverse to the deceased's or respondents' title. We do not think that it is tenable for the appellant to claim his entitlement to the suit property in accordance with the Luo customary law and the same time claim it through adverse possession
- The two are mutually exclusive.
36. Finally, there was evidence that the deceased had taken the appellant to court and obtained injunctive orders against him. That act alone had the effect of stopping the time from running for purposes of adverse possession. In any event, and as correctly pointed out by counsel for the respondents, the appellant did not plead this claim in his filings thereby rendering the claim legally unsustainable. Taking all the foregoing into consideration we are satisfied just like the two courts below that the appellant's claim based on adverse possession was premature as the 12-year statutory period had not elapsed, since the respondents had been registered as the proprietors of the suit property.
37. The respondents' assertion of indefeasible ownership of the suit property pursuant to Sections 24(a) and 26 of the *Land Registration Act* cannot be gainsaid. It is a fundamental principle, ensuring that registered proprietors of parcels of land enjoy absolute ownership unless their title is successfully challenged on specific grounds such as fraud, misrepresentation, or illegal acquisition. Section 24(a) of the Act provides that the registration of a person as the proprietor of land vests in that person absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Similarly, Section 26(1) of the Act provides that a certificate of title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person so registered is the absolute and indefeasible owner, unless fraud or misrepresentation to which he is a party is proved or the title was acquired illegally, unprocedurally, or through a corrupt scheme.
38. In *Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others* [2012] eKLR, the Supreme Court reinforced these principles, holding that title conferred through registration is absolute and should only be challenged where there is clear evidence of fraud, misrepresentation, or illegal acquisition. Moreover, the principle of sanctity of title is meant to provide certainty in property



transactions, preventing parties from interfering with legally registered ownership unless they meet the strict legal threshold for contesting title. Courts have consistently upheld the validity of registered land ownership. See also for instance the case of Alfred Ochieng Onyango v Attorney General & Another [2019] eKLR.

39. We are in agreement with the respondents' reliance on these cases, as the appellant failed to demonstrate any irregularity in the manner the respondents acquired title to the suit property. The appellant neither presented evidence of fraud nor that the respondents' registration was unlawful or un-procedural or was obtained through a corrupt scheme. The courts correctly applied the law in dismissing the appellant's counterclaim and affirming the respondents' rightful ownership of the suit property.
40. In conclusion, we find no fault in the judgments of the trial court and the ELC. Accordingly, the appeal is dismissed with costs to the respondents.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF JULY, 2025.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

