



REPUBLIC OF KENYA



KENYA LAW
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**Issa v Suleiman & 3 others (Civil Appeal E025 of 2023)
[2025] KECA 1336 (KLR) (18 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1336 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E025 OF 2023
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
JULY 18, 2025**

BETWEEN

AHMED MOHAMED ISSA APPELLANT

AND

SULEIMAN ISSA SULEIMAN 1ST RESPONDENT

FATMA ISSA SULEIMAN 2ND RESPONDENT

NOOR ISSA SULEIMAN 3RD RESPONDENT

SULTAN ISSA SULEIMAN 4TH RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (N. Matheka, J.) delivered on 6th December 2022 in E.L.C Case No. 398 of 2017)

JUDGMENT

1. The genesis of the instant appeal is the respondents' suit against the appellant in Mombasa ELC Case No. 398 of 2017 in determination of which the learned Judge (N. A. Matheka, J) allowed the respondents' claim as prayed in their plaint dated 3rd November 2017 vide the impugned judgment dated 6th December 2022.
2. The respondents' case was: that they were the beneficial owners of the house on Plot No. Mombasa/Block XVII/544 (the suit property); that the house aforesaid was initially a semi-permanent structure built on a rented plot belonging to the respondents' deceased mother, Hamude Binti Khamis; and that the respondents' late father, Issa Suleiman, purchased the land on which their deceased mother's house stood and had it registered in the names of their (the respondents') elder brother, the late Mohamed Issa Suleiman, who was father to the appellant.



3. The respondents further averred that, by an Agreement dated 4th June 1979, the late Issa Suleiman and Mohamed Issa Suleiman (the respondents' father and the appellant's father respectively) Mohamed Issa Suleiman agreed to hold the title to the suit property as a trustee for himself and the respondents; that their late father (Issa Suleiman), with the assistance of the 2nd respondent (Faiza Issa Suleiman), demolished the temporary structure and built a permanent house where the appellant's deceased father and the respondents continued to reside; that the respondents' deceased father also gave consent to the appellant's late father to build an apartment on the 1st floor where he moved in and lived with his family; that in breach of trust, Mohamed Issa Suleiman built an additional two floors thereon; that despite registration of the suit property in the name of the late Mohamed Issa Suleiman, the actual ownership of the suit property, with the exclusion of the 1st, 2nd and 3rd floors, belonged to the respondents; that they have been in occupation of the suit property since birth, and for a period exceeding 12 years; that they therefore acquired ownership by way of adverse possession; and that the appellant filed Kadhis Court Succession Case No. 72 of 2017 seeking to inherit the suit property and evict the respondents on the allegation that it was part of his deceased father's estate.
4. By reason of the matters aforesaid, the respondents prayed for:
 - “ 1. A declaration that the plaintiffs are the beneficial owners of the house existing on Plot Number MSA/Block XVII/544 along with the defendant's deceased's father's estate.
 2. In the alternative, a declaration that the plaintiffs have acquired title by adverse possession.
 3. A permanent injunction restraining the defendant personally or through his servants and/or agents from evicting the plaintiffs from Plot Number MSA/Block/XVII/544.
 4. Costs of and incidentals to this suit.”
5. Contemporaneous with their plaint, the respondents successfully applied for stay of proceedings in Kadhis Court Succession Case No. 27 of 2017 pending determination of their suit.
6. In his statement of defence dated 2nd August 2018, the appellant denied the respondents' claim and averred: that his late father purchased the suit property from Abdula Kaderina and Sakinabai Abdulkarim in 1966 for a consideration of Kshs. 10,000/- after which an indenture was duly executed and registered in his name on 1st October 1966; and that no Agreement was ever made between the respondents' deceased father and his deceased father to hold the suit property in trust for both him and the respondents.
7. The appellant further averred that the temporary structure was demolished in 1971 whereupon the family members went their way until the permanent house was constructed; that his late father invited his parents together with his siblings to live with his family out of kindness and good faith; that his deceased father was the lawful owner of the suit property; that, after his deceased father's demise, the appellant and his siblings applied for letters of administration to the deceased's estate; that the respondents have failed to prove ownership of the suit property; that the sale agreement relied upon by them was a forgery; and that he filed suit in Kadhis Court Succession Case No. 27 of 2017 when the respondents refused to vacate the suit property and claimed to have a share thereto. He prayed that the respondents' suit be dismissed with costs.



8. In its judgment dated 6th December 2022, the ELC (N. A. Matheka, J) allowed the respondents' claim with costs. As the learned Judge observed:

“I find that originally a mud walled house that had been erected on the suit property was a house without land which belonged to the Plaintiffs' mother and the whole family resided there. The deceased father [the Respondents' father] purchased the suit property in the name of the deceased's and the deceased [the Appellant's father] made an agreement that he would hold the title as a trustee for his siblings.

... ..

I find that the Plaintiffs are the beneficial owners of the house existing on Plot Number MSA/Block/XVII/544.”

9. Aggrieved by the learned Judge's decision, the appellant moved to this Court on appeal on 4 grounds, namely that the learned Judge erred in law and in fact: (i) in placing reliance on the agreement of 4th June 1979 allegedly creating a trust for the respondents; (ii) by misdirecting herself on the veracity of the agreement of 4th June 1979; (iii) by misdirecting herself that Hamude as listed at No. 10 on the list of beneficiaries was the respondents' mother and not the appellant's sister; and (iv) in holding that the respondents are the beneficial owners of the house on the suit property despite the respondents' acknowledgement that the house was built by the appellant's father.
10. In support of the appeal, learned counsel for the appellant, M/s. Hassan Alawi & Company, filed written submissions dated 5th August 2024 citing the cases of *Mwau v the Attorney General* [2023] KECA 518 (KLR), highlighting the duty of the 1st appellate court to evaluate and reanalyse the record and come up with its own conclusion; and *Kenneth Nyaga Mwigie v Austin Kiguta & 2 Others* [2015] eKLR, submitting that, according to section 107 of the *Evidence Act*, the burden of proof to establish the existence of a trust relationship was on the respondents, which they failed to discharge.
11. In rebuttal, learned counsel for the respondents, M/s. A. O. Hamza & Company, filed written submissions dated 28th August 2024 and a list of authorities dated 30th January 2025 also citing the case of *Kenneth Nyaga Mwigie v Austin Kiguta & 2 Others* (*supra*), in support of the submission on the admissibility of the agreement of 4th June 1979 on the basis of which the learned Judge found that the appellant's father held the building in trust; and *Chevron (K) Ltd v Harrison Charo Wa Sutu* [2016] eKLR, on the contention that the appellants had proved their claim in adverse possession.
12. This Court's mandate on 1st appeal was espoused in *Ng'ati Farmers' Co-Operative Society Ltd v Ledidi & 15 Others* [2009] KLR 331 as follows:

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

13. However, we are conscious as cautioned by the predecessor to this Court in *Peters v Sunday Post Ltd* [1958] EA 424 that:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to



determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”

14. In our view, the only issue that commends itself for our determination is whether the learned Judge was at fault in holding that the house without land situate on the suit property was held in trust for both the appellant and the respondents, and that the respondents were entitled to the ground floor thereof.
15. We need to point out right at the outset that, apart from the 3 grounds of appeal relating to the contested trust, the 3rd ground raising the peripheral question as to whether Hamude, who was listed as one of the beneficiaries, was the respondents’ mother and not the appellant’s sister was not pursued. In any event, it was inconsequential to the existence and validity of the trust in issue and, therefore, nothing turns thereon.
16. On the issue as to the existence of the trust, the learned Judge held that the respondents were “... the beneficial owners of the house existing on plot No. Mombasa/Block XVII/544”; and that “the deceased father [to the respondents] purchased the suit property in the name of the deceased [the appellant’s father] and the deceased made an agreement that he [the appellant’s father] would hold the title as a trustee for his siblings”.
17. Taking issue with the learned Judge’s holding, counsel for the appellant submitted that the Agreement on which the trust was founded was not produced as an exhibit by close of the respondents’ case; that its authenticity and contents thereof were not formally proved; and that no evidence was tendered to prove that the house or property was held by the appellant’s father on behalf of his siblings and that, therefore, no trust relationship can be inferred.
18. On their part, counsel for the respondents submitted that the trial proceeded after the parties had filed their list of documents and completed their pre-trial procedures; the parties had the opportunity to object to any of the documents they considered inadmissible; that, during the trial, the court stopped the parties from raising unnecessary objections and stated that it would go through the bundles of documents and form its own opinion in its judgment; that, in any event, the document [the agreement] was prepared by the appellant’s grandfather and conferred some benefits to the appellant’s father; that the court directed that the document be marked for identification and thereafter allowed the respondent to continue with cross-examination; and that it was after analysing the evidence in its entirety that the court came to a conclusion that the appellant’s father held the building in trust for the respondents.
19. Counsel cited the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 Others* (*supra*) where this Court held:

“When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.”
20. We also take to mind the elaborate dicta of the learned Judges in the afore-cited Kenneth Nyaga Mwige’s case where they had this
to say with regard to the production of documentary evidence:

“Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its



authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.”

21. Counsel for the appellant contends that the Agreement on which the trust is founded was merely marked for identification but not produced in evidence. However, the record speaks for itself. At page 170 of the record of appeal containing the typed proceedings of the trial court, we find the following statement of the 1st respondent (Suleiman Issa Suleiman), who testified as PW1 :

“I filed a list of documents and wish to have them produced as pex 2-5. The first document is an agreement marked as PMFI 1.”

22. It is indisputable that the witness applied to produce the documents as exhibits “pex 2-5”, which included the Agreement marked “PMFI 1”. Following Suleiman’s testimony and request that the Agreement be admitted and marked as an exhibit, the learned Judge proceeded to mark it as “PEX-1”. In effect, the Agreement was duly produced in evidence as proof of the contested trust.

23. The self-explanatory contents of the Agreement are instructive, and which we take the liberty to recite in part as hereunder:

“Where it is Mutually Binding [and] Agreed Upon

1. That the mentioned Plot No. 544/XVII has an existing house without land which was inherited by your mother Hamude Binti Khamis from your grandmother and been assigned to you on behalf of your sibling and your mother.
 2. That I have bought the Plot No. 544/VXII land only in 1967 where the house is built. The house was built between 1968 and 1969 when it was completed after which the family shifted in 1971.
 3. That whereas the new house after demolition is under my son’s name Mohamed Issa Suleiman because of the life challenges I am going through at the moment.
 4. That of which after settlement I will take charge and control my family property.
24. That the new existing house belong to the family and my son Mohamed Issa Suleiman has a right to build on top of the new house on Plot No. 544/VII and further extension will be his property and any of your siblings can do so if willing and desires.
6. This agreement concerning this property on Plot No. 544/XVII supersedes all previous agreements (if any) whether written or oral between the parties in respect of this matter.”
25. With regard to its authenticity, it is noteworthy that the Agreement aforesaid was executed by the appellant’s father and the respondents’ father on 4th June 1979 and attested to by an advocate in the firm of Chudasama & Company, Advocates, who duly appended his/her signature and affixed their firm’s official stamp thereon. The uncontroverted evidence of its existence and authenticity leads to



the inescapable conclusion that the learned Judge was not at fault in holding that the suit property was held in trust for both the respondents and the appellant, and that the respondents were the beneficial owners of the ground floor thereof.

26. In view of the foregoing, we find that the appeal fails and is hereby dismissed in its entirety. Consequently, the judgment and decree of the ELC at Mombasa (N. A. Matheka, J) dated 6th December 2022 is hereby upheld.

27. The appellant shall bear the costs of the appeal. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF JULY 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

