



**Kisach v Kisach (Environment and Land Appeal E032 of 2024)  
[2025] KEELC 3128 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 3128 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E032 OF 2024  
EC CHERONO, J  
MARCH 27, 2025**

**BETWEEN**

**BRAMWEL NAIBEI KISACH ..... APPELLANT**

**AND**

**MARKO NAIBEI KISACH ..... RESPONDENT**

*(Being an appeal from the judgment and decree delivered on  
28/06/2024 by Hon.K.Langat (PM) in Sirisia MCELC 19 OF 2021.)*

**JUDGMENT**

**Introduction.**

1. This appeal arises from the Judgment of the lower court suit PM-ELC NO.E019 of 2021 between Bramwel Naibei Kisach -the appellant herein as the defendant and Marko Naibei Kisach –the Respondent herein as the plaintiff.
2. The suit before the trial court was instituted by the Respondent vide a plaint dated 09/11/2021 where he contended that he is the absolute legal registered owner and proprietor of land parcel LR No. N.Malakasi/N.Wamono/200 measuring 2.8ha (hereinafter referred to as ‘the suit land’). That the Appellant encroached onto the suit land thus denying him access which amounts to an affront to his proprietary rights. He sought for judgment against the Appellant for;
  - a. An order of eviction against the defendant from LR No. N.Malakasi/N.Wamono/200.
  - b. A permanent injunction restraining the defendant, his family, servants, agents, workers and any persons claiming through him from trespassing, disposing off, constructing, cultivating and/or interfering in any way with the plaintiff’s LR No. N.Malakasi/N.Wamono/200.
  - c. Costs of this suit.



- d. Any relief this court may deem fit to grant.
3. The Appellant filed a defence dated 07/12/2021 where he averred that the suit land was shared amongst the parties herein by their late father namely Suruali Kisache in the year 1990 before his demise. That he has neither trespassed nor prevented the Respondent's occupation of the suit land as each of them occupy their respective portions/shares since 1990 to date. That the suit land is registered in the name of Suruali Kumonyim Kisach but not the Respondent therefore, the plaintiff lacks proof of ownership of the suit land. Lastly, he averred that he was not aware of any suit before the land District Tribunal and the ruling in Succession Cause No.4 of 2010
  4. During the hearing, the Respondent testified as the sole witness in support of his case while the Appellant called 5 witnesses.
  5. Marko Naibei Kisachi (PW1) testified that the court in Succession Cause No. 4 of 2020 directed that the suit land belongs to him while LR No. N.Malakasi/N.Wamono/238 goes to the Appellant. The Appellant did not appeal against the said decision and he thereafter obtained his title. Since the said decision was rendered on 30/7/2015, the Appellant has refused to vacate the suit land and instead, he has sold part of his share in LR No. N.Malakasi/N.Wamono/238 and parcel no. 100 which belonged to their other brother leaving his wife and children destitute. On cross-examination, he stated that he has previously filed a suit relating the issue in question before the Mt. Elgon Tribunal and Kimilili Court.
  6. Bramwel Naibei Kisach (DW1) adopted his witness statement as his evidence in chief. He also produced as exhibits documents contained in his list of documents. He testified that he has resided in the suit land since childhood. He stated that the Respondent obtained the title through forgery. On cross examination, he stated that he never attended the proceedings before the tribunal or Kimilili court.
  7. Jason Kisach (DW2) testified that in the year 1990, the father to the parties herein called for a clan meeting which was attended by the chairman of the clan, village elders and the chief. That he (D2) was in attendance as the clan chairman. That the suit land was subdivided and trees were planted as a boundary. On cross-examination, he stated that minutes of the meeting were not taken down.
  8. Joshua Chesoli Kiboi (DW3) testified that in the year 1990, he was the assistant chief of Chepkube area. That the parties' father called a meeting and subdivided land among his sons and placed boundaries. He further testified that minutes of the meeting were not taken down.
  9. Zaddok Chesebe (DW4) & Laban Chemait (DW5) reiterated their testimony as contained in their witness statements.
  10. The trial court in full determination of the facts as pleaded and evidence placed before it entered judgment in favour of the Respondent and granted the prayers as sought in the plaint. The impugned judgment is what has given rise to the present appeal.

### **The appeal.**

11. From the Memorandum of appeal dated 11<sup>th</sup> July 2024, the Appellant raises five (5) grounds of appeal as follows:
  - a. The learned trial magistrate erred in law and in fact when she failed to appreciate the weight of evidence offered by the defendant that proved his entitlement to the suit land.



- b. The learned trial magistrate erred in law and in fact by holding that the Court at Sirisia conducted succession cause that yielded title to the plaintiff failing to note that the same was conducted secretly hence could not yield a clean title.
  - c. The learned trial magistrate erred in law and in fact when she failed to resolve the serious contradictions, lack of evidence and variance of pleadings and evidence by the plaintiff and in fact gave them a clean bill of health without considering the rival defence and evidence by the defendant.
  - d. The learned trial magistrate erred in law and in fact when he failed to hold that the claim by the plaintiff was statute barred, unenforceable and irredeemably defective.
  - e. The entire judgment was contrary to the tenants of justice and veracity of the evidence tendered.
12. The Appellant therefore urges this Honourable Court to allow the appeal, vacate the orders issued by the lower court and dismiss the Respondent's claim with costs
13. When this appeal came for directions, the parties agreed to canvass the same by way of written submissions.
14. The Appellant filed submissions dated 05/12/2024 while the Respondent filed his submissions dated 22/01/2025 which this honourable court has read and considered in the determination of this appeal.

#### **Analysis and determination.**

15. I have keenly reviewed the record of appeal, the grounds of appeal contained in the memorandum of appeal herein and the rival submissions and find that the main issue for determination is whether in the circumstances, this court should interfere with the findings of the trial court and set aside its judgment and decree delivered on 28/06/2024.
16. This being a first appeal, this court has a duty to analyze and re-assess the evidence on record and reach its own conclusion. The court in *Kenya Ports Authority v Kunston (Kenya) Ltd*, (2009) 2 EA 212 held as follows: -
- “This being a first appeal to this court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect...”
- See also *Selle v Associated Motor Boat Co* [1968] EA 123).
17. At the centre of the dispute between the parties herein is the issue of trespass and ownership of land parcel no. N.Malakasi/N/Wamono/200. It is the Respondent's contention that he is the legal and absolute registered owner of the suit land while the Appellant contends that he has a share in the said land, the same having been allocated to him by their deceased father prior to his demise.
18. In support of his case, the Respondent produced a certificate of title indicating that he was allocated the disputed land on 03/01/2019. Additionally, he produced a certificate of grant issued in Sirisia SRM Succession Cause No. 4 of 2010 showing that he acquired through transmission and that the suit land devolved to him as a beneficiary in the succession proceedings. In support of his case, the Appellant called witnesses who testified in support of his claim and produced a letter from the area chief.
19. The Appellant has also called upon this Honourable court to examine the validity and authenticity of the title deed produced by the Respondent at the trial court. I wish to restate that the duty of a first



appellate court does not entail taking into account matters which were not pleaded/raised, addressed or determined at the trial stage. I have looked at the statement of defence by the Appellant and I note that the Appellant did not specifically plead fraud nor challenged the said title produced by the Respondent at the trial stage. It is well settled that allegations of fraud are very serious allegations and must be strictly proved to the required standard.

20. Section 24 of the *Land Registration Act* No 3 of 2012 states that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Section 25 of the said Act also provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—to encumbrances, charges or leases shown on the register and the overriding interests as stated in Section 28 of the Act.
21. Section 26 of the *Land Registration Act* is categorical that a Certificate of title is prima facie evidence that the person named therein is the absolute owner of the land but the same may be challenged where on grounds of fraud and misrepresentation and where the title was acquired illegally, unprocedurally or through a corrupt scheme. See *Elijah Makeri Nyangwa vs. Stephen Mungai Njuguna & Another* (2013) eKLR and *Chemei Investments Limited vs. The Attorney General & Others* Nairobi Petition No. 94 of 2005.
22. The above section envisages 2 instances where a title document may be challenged and the same are either through fraud or misrepresentation or through a corrupt scheme. Further to paragraph 19 above and as required under Section 107(1) of the *Evidence Act*, the Appellant has not proved his allegations to the required standard. No evidence was adduced in the trial court to prove that the Respondent's title deed was acquired through fraud or misrepresentation. Therefore, in the absence of any proof, this court finds that the certificate of title produced by the Respondent is conclusive evidence of ownership that the Respondent is the absolute and indefeasible owner of the suit land.
23. Further, it is not in contention that in *Sirisia Succession Cause No.4 of 2010*, the Appellant admitted to have filed an objection and the court delivered a ruling dismissing the objection and upholding the mode of distribution of the estate of *Suruali Kumonyim Kisach* as per the certificate of confirmation of grant produced where the Appellant was given land parcel no. *N.Malakasi/N.Wamono/238* while the respondent was given land parcel no. *N.Malakasi/N.Wamono/200*. The Appellant did not present evidence challenging the decision of the succession court and as it stands, the Respondent who acquired his title as a result of the transmission was well within the law to do so.
24. The argument by the Appellant that their deceased father shared the suit land amongst the two of them and placed boundaries is unsubstantiated and automatically fails in the absence of documentary evidence in support of the same. It is trite that he who alleges must prove and in view of the unchallenged certificate of grant, the Respondents title remain absolute and indefeasible.
25. Therefore, having found that the Respondent is the registered owner of the suit land and he contends that the Appellant's occupation is without his consent, this therefore leads the court to the provisions of Section 3 (1) of the *Trespass Act* which defines trespass as follows: -

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”



26. It is therefore my finding that the Respondent is entitled to all the rights, interest and privileges that appertain to the suit land.
27. In conclusion, I find that this appeal is without merit and the same is hereby dismissed with each party to bear their own costs.
28. It is so ordered.

**DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 27<sup>TH</sup> DAY OF MARCH, 2025.**

.....

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. Mr. Olonyi for the Appellant
2. Mr. Wakasa H/B for Murunga for the Respondent.
3. Bett C/A.

