



REPUBLIC OF KENYA



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**Juma & another v Mayeya & 2 others (Environment & Land Case
128 of 2019) [2025] KEELC 1294 (KLR) (18 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1294 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 128 OF 2019
DO OHUNGO, J
MARCH 18, 2025**

BETWEEN

PATRICK SHIOYI JUMA 1ST PLAINTIFF

SEFU SHISIA 2ND PLAINTIFF

AND

EMILY AKHULE MAYEYA 1ST DEFENDANT

SELINA AKHULE MAYEYA 2ND DEFENDANT

**LAND REGISTRAR KAKMEGA DISTRICT LAND REGISTRY 3RD
DEFENDANT**

JUDGMENT

1. The Plaintiffs filed this suit in the High Court at Kakamega on 31st July 2012, through Plaint dated 3rd July 2012. The matter was later transferred to this Court.
2. The Plaintiffs averred in the Plaint that the First and Second Defendants were wives of Washington Mayeya Matete (deceased) who was the Plaintiffs' uncle and the registered proprietor of the parcel of land known as Marama/Shirotsa/1096 (the suit property). That the deceased held the suit property for himself and in trust for Paul Juma Amwayi who was the deceased's late brother and the Plaintiffs' father. That after the deceased's death, the Defendants fraudulently subdivided the suit property into parcels 1738 and 1736.
3. The Plaintiffs therefore prayed for judgment against the Defendants jointly and severally for the following orders:
 - a. The subdivision of Marama/Shirotsa/1096 into Land Parcel No. 1737 - 1758 and further subdivision of 1737 into 1760 and 1761 be nullified and revert to 1096.



- b. That the land be subdivided and shared between Patrick Shisia to get 4 acres and Sefu Shisia to get 4 acres and the rest to remain 10 acres with the defendants.
 - c. Costs of this suit.
4. The First and Second Defendants filed a Statement of Defence and Counterclaim through which they denied the allegations of trust and fraud. In their counterclaim, they averred that they were the proprietors of the suit property and that the Plaintiffs' occupation and use of one acre of the suit property was illegal. The First and Second Defendants therefore prayed that the Plaintiffs' suit be dismissed, and that judgment be entered in their favour for a declaration that the Plaintiffs' occupation and use of the suit property was illegal and that an eviction order be issued against the Plaintiffs, their servants, agents or any other person claiming through them. They also sought costs of the suit.
5. The First Defendant passed away on 18th October 2019 and was substituted by Helda Okutoyi Mayeya, pursuant to an order made on 6th December 2021.
6. The Third Defendant neither entered appearance nor filed any defence.
7. Patrick Shioyi Juma (PW1) adopted his witness statement dated 3rd July 2012 and produced copies of the documents listed as item numbers 1 to 7 in the Plaintiffs' List of Documents dated 3rd July 2012. He stated in the statement that the suit property was registered in the name of Washington Mayeya Matete who was a brother to his father in 1964 and that his father was working at Moi's Bridge at the time of land registration. That the suit property was registered in Washington Mayeya Matete's name to hold in trust for the whole family. He also stated that his father died in 1970 before the suit property was subdivided and that he had lived with Washington Mayeya from 1970 when his father died until 1993 when Washington died.
8. PW1 also stated that the suit property was not subdivided during Washington's lifetime and that after his death, his two widows carried out succession without PW1's knowledge and without listing the Plaintiffs as beneficiaries. That he took the matter to Butere Land Disputes Tribunal which ordered that the Plaintiffs be given 8 acres out of the total of 18.3 acres and that the Tribunal's decision was adopted in Kakamega Courts with the Court ordering that PW1 be given 4 acres out of the 18.3 acres plus costs of the suit. That the Court also ordered that the suit property be subdivided, and new titles issued to the new owners and that although he invited family to sign nullifying the old title deed so that new ones could be processed, they instead subdivided the suit property and sold it to third parties who were purchasers. He urged the Court to order cancellation of the new titles.
9. During cross-examination and re-examination, PW1 stated that he was residing on 1 acre of the suit property as of the date of his testimony and that his father was Juma Paulo, but he did not know his paternal grandfather's name. That Washington Mayeya inherited the suit property from Simeon Matete who was Washington's father and that he learnt that there were succession proceedings in Kakamega Law Courts around 1978 concerning the estate of Washington, but he did not file any objection proceedings in the succession cause.
10. The Plaintiffs' case was then closed.
11. Helda Okutoyi Mayeya (DW1) adopted her witness statement dated 17th February 2023 and produced a copy of the documents listed as item number 1 to 7 in the First and Second Defendants' List of Documents dated 17th February 2023. She stated in the statement that Emily Akhule Mayeya was her mother and that both her mother and Selina Akhule Mayeya were widows to Washington Mayeya Matete who was the registered proprietor of the suit property. That the Plaintiffs are sons to Paulo Juma who had no relationship with Washington Mayeya Matete and that PW1 had been occupying



an acre of the suit property through goodwill from her family while the Second Plaintiff passed away in the year 2015.

12. DW1 added that Washington Mayeya Matete passed away in the year 1993 and that succession proceedings in respect of his estate were conducted in Kakamega Succession Cause No. 123 of 1995 pursuant to which the suit property was vested in the two widows: Emily Akhule Mayeya and Selina Akhule Mayeya. DW1 further stated that arising from this case, her family no longer intends to extend the goodwill to PW1 and that they would like him evicted as per the counterclaim.
13. DW1 went on to testify that as of the date of her testimony, the registered proprietors of the suit property were Emily Akhule Mayeya and Selina Akhule Mayeya. That even though both her and the Plaintiffs are members of Abatere clan, the Plaintiffs are not members of her family. She also stated that she was born in 1960 on the suit property and lived her entire life on it up to the date of her testimony. That she never saw PW1 on the suit property as she grew up and that the Second Plaintiff was buried on the suit property.
14. DW1 also testified that the Plaintiffs were in occupation of the suit property when they filed succession proceedings in 1995 in respect of Washington's estate. That they did not inform the Plaintiffs of the filing since they were not children of the deceased. She also confirmed that PW1 sued her mother and Selina Akhule Mayeya in the tribunal and that the tribunal ordered that PW1 gets 4 acres out of the suit property.
15. The First and Second Defendants' case was then closed. Since the Third Defendant neither entered appearance nor attended court, his case was closed upon an application by counsel for the Plaintiffs.
16. Thereafter, parties filed and exchanged written submissions. The Plaintiffs filed submissions dated 7th July 2023 while the First and Second Defendants filed submissions dated 10th November 2023. The Third Defendant did not file any submissions.
17. I have considered the parties' pleadings, evidence and submissions. The issues that arise for determination are whether customary trust has been established and whether the reliefs sought should issue.
18. Trust is a question of fact which must be established through evidence. In *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR, the Supreme Court distilled the key considerations in customary trust as follows:

Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land
2. The claimant belongs to such family, clan, or group
3. 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.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.



5. The claim is directed against the registered proprietor who is a member of the family, clan or group.
19. Consequently, to establish customary trust, the Plaintiffs must prove that the suit property was family or clan land before registration. A person claiming customary trust must demonstrate that he belongs to the family or clan in issue. Failure to do so leads to a conclusion that his relationship to the family or clan is remote and that his claim is adventurous. The Plaintiffs have not established any family connection between them and Washington Mayeya Matete who was the registered proprietor of the suit property. I also found it strange that for a person who is staking claim to land on account of customary trust, PW1 could not tell the name of his own grandfather. The Plaintiffs have failed to prove that the suit property was family or clan land before registration. I find that customary trust has not been established.
20. The Plaintiffs sought an order that subdivision of the suit property into parcel umbers 1737 to 1758 and further subdivision of 1737 to 1760 and 1761 be nullified. They have not provided any proof that all the current registered proprietors of the subdivisions have been joined to this case. Whereas they produced a register in respect of Marama/Shirotsa/1738, the said document shows that the registered proprietors of the said parcel as of 12th January 2009 were Selina Mayeye Achoti and Judith Andayi Omuka. Judith Andayi Omuka has not been joined to this case. Further, the Plaintiffs have not tendered any evidence as to the registered proprietors of Marama/Shirotsa/1760 and 1761. Besides the failure to prove customary trust, the Court cannot issue orders affecting proprietorship of parcels whose owners have not been given a hearing. In the circumstances, I find no merit in the Plaintiffs' case.
21. In their counterclaim, the First and Second Defendants prayed that judgment be entered in their favour for a declaration that the Plaintiffs' occupation and use of one acre of the suit property is illegal and that an eviction order be issued against the Plaintiffs, their servants, agents or any other person claiming through them. There is no dispute that the First Plaintiff is in occupation of one acre of what was the suit property. Whereas DW1 testified that the Second Plaintiff passed away in the year 2015, the First Plaintiff remained mum on the issue and did not refer to the Second Plaintiff beyond his listing in the Plaint as a party.
22. Although the Plaintiffs produced a certificate of official search dated 15th January 2009 which states that the title in respect of the suit property was closed on 5th November 2008 upon its subdivision into Marama/Shirotsa/1737 and 1738, the First and Second Defendants did not offer any evidence to show that the suit property still exists as they claim in their counterclaim. Further, in view of the subdivisions and new titles referred to by the Plaintiffs, the First and Second Defendants did not plead and demonstrate which particular parcel the First Plaintiff is in occupation of and who is the registered proprietor of the said parcel. The Court cannot order eviction from an unspecified parcel.
23. In view of the foregoing, I find no merit in the counterclaim.
24. It has been severally held by the courts that parties are bound by their pleadings and that the court too is in a sense bound by the parties' pleadings since pleadings circumscribe the issues for determination and reliefs sought. See Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR.
25. Even though the outcome of this case may appear to leave parties in the position in which they were prior to approaching the Court, it must be remembered that the Court can only resolve the case that is placed before it by way of competent pleadings followed by evidence. The Court cannot go out of its way to frame a case for parties then resolve it. If the pleadings and evidence availed by the parties



do not help resolve a dispute, the Court's capacity to do justice is hampered since it becomes an issue of jurisdiction.

26. In the result, none of the parties have proved their respective claims. I dismiss both the Plaintiffs' suit and the counterclaim. In view of the outcome, I make no order as to costs.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 18TH DAY OF MARCH 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

The Plaintiff present

No appearance for the First and Second Defendants

No appearance for the Third Defendant

Court Assistant: B Kerubo

