



**Mufoyongo & another v Shivachi & 3 others (Environment & Land  
Case 96 of 2019) [2025] KEELC 3800 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3800 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 96 OF 2019**

**DO OHUNGO, J**

**MAY 15, 2025**

**BETWEEN**

**PATRICK LUMUMBA MUFOYONGO ..... 1<sup>ST</sup> PLAINTIFF**

**EUNICE MUCHITI MATEKWA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ROSEMARY SHIVACHI ..... 1<sup>ST</sup> DEFENDANT**

**BONFACE LIJODI ..... 2<sup>ND</sup> DEFENDANT**

**MACDONALD LIJODI MAKAKA ..... 3<sup>RD</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KAKAMEGA ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Litigation in this matter commenced in the Subordinate Court on 9<sup>th</sup> October 2018, when Patrick Lumumba Mufoyongo and Mark Izavane Mufoyongo filed two Originating Summons (OS) dated 9<sup>th</sup> October 2018. The two cases were serialised as Kakamega MC E&L No. 987 of 2018 and Kakamega MC E&L No. 988 of 2018. Upon an application by the Applicants/Plaintiffs, the two matters were transferred to this court and consolidated.
2. Mark Izavane Mufoyongo passed away and was substituted by Eunice Muchiti Matekwa. Subsequently, the initial OSs were replaced with Amended OS dated 16<sup>th</sup> May 2022.
3. The Plaintiffs averred in the Amended OS that they had acquired title to the parcels of land known as Isukha/Shirere/1XX6 and Isukha/Shirere/1XX4 (the suit properties) by adverse possession. They sought determination of the following:
  1. Whether the Applicants have been in continuous, open and peaceful occupation of land parcel No. Isukha/Shirere/1XX6 and Isukha/Shirere/1XX4 for a period of more than 12 years.



2. Whether at the time of registration of the 1<sup>st</sup> respondent's husband and father to the 2<sup>nd</sup> respondent the late Jeremiah Shivach as proprietor of land parcel Isukha/Shirere/1XX6 and registration of 3<sup>rd</sup> respondent as proprietor of land parcel Isukha/Shirere/1XX4 thereof in collusion with 4<sup>th</sup> respondent, their interest had been extinguished by effluention (sic) of time.
  3. Whether the applicants have acquired the whole of land parcels No. Isukha/Shirere/1XX6 and Isukha/Shirere/1XX4 by adverse possession.
  4. Whether the registration of 1<sup>st</sup> respondent's husband and father to the 2<sup>nd</sup> respondent the late Jeremiah Shivach as proprietor of land parcel Isukha/Shirere/1XX6 and registration of 3<sup>rd</sup> respondent as proprietor of land parcel Isukha/Shirere/1XX4 thereof in collusion with 4<sup>th</sup> respondent was done fraudulently and unlawfully.
  5. Who should be condemned to pay costs.
4. Hearing of the Amended OS proceeded by way of oral evidence. Prior to commencement of the hearing, the Plaintiffs' case against the Third Defendant was dismissed with no order on costs owing to the Plaintiffs' failure to serve him despite being given several opportunities to do so.
  5. Patrick Lumumba Mufoyongo testified that the suit properties belonged to his grandfather. He urged the court to award him the suit properties so that he conducts succession proceedings in respect of his grandfather's estate. He also stated that he was residing at Muhonje as of the date of his testimony and that he had been born and brought up at Muhonje. That Makalamani Makaka who was his grandfather had two parcels of land: one at Isukha Shirere and the other at Muhonje.
  6. Mr Mufoyongo went on to testify that as of the date of his testimony, the First Respondent/Defendant and her family were in occupation and use of Isukha/Shirere/1XX6 and that he did not know when they started using the parcel. The Plaintiffs' case was then closed.
  7. Bonface Lijoodi Shivachi (DW1) adopted his witness statement dated 7<sup>th</sup> November 2018 as well as his replying affidavit which he swore on 7<sup>th</sup> November 2018. He produced a copy of the title deed in respect of Isukha/Shirere/1XX6 and copies of the documents listed as item numbers 1 and 2 in his list of documents dated 7<sup>th</sup> November 2018.
  8. He stated that the Plaintiffs' grandfather and his grandfather were brothers and that the Plaintiffs had never occupied or used parcel number Isukha/Shirere/1XX6. That as of the date of his testimony, the registered proprietors of parcel number Isukha/Shirere/1XX6 were Elijah Kwame and Jeremiah Shivachi both of whom are deceased. He added that Jeremiah Shivachi was his father and that succession proceedings in respect of Jeremiah's estate were yet to be conducted. That as of the date of his testimony, his family was in occupation and use of parcel number Isukha/Shirere/1XX6.
  9. Frank Navagwi Shivachi (DW2) adopted his witness statement dated 7<sup>th</sup> November 2018 and stated that the First Defendant is his stepmother while the Second Defendant is his younger brother. That Elijah Kwame was his uncle while Jeremiah Shivachi was his father. He also stated that the family was yet to petition for letters of administration in respect of the estate of Jeremiah Shivachi.
  10. The First and Second Defendants' case was then closed.
  11. Lastly, Namayi Ben Ochomo (DW3), the Fourth Defendant's Director of Alcoholic Drinks Control adopted his undated witness statement which he filed on 10<sup>th</sup> May 2022 and produced copies of the documents listed as item numbers 1 to 6 in the Fourth Defendants list of documents dated 10<sup>th</sup> May 2022. He stated that parcel number Isukha/Shirere/1XX4 is public land which has been owned by



the Fourth Defendant and its predecessor local governments since 1973. The Fourth Defendant's case was thereafter closed.

12. Pursuant to directions given by the court, the Plaintiffs filed undated submissions on 16<sup>th</sup> December 2024, the First and Second Defendants filed submissions dated 4<sup>th</sup> November 2024 while the Fourth Defendant filed submissions dated 5<sup>th</sup> November 2024.
13. I have considered the pleadings, evidence and submissions. The issues that arise for determination are whether the First and Second Defendants have locus standi, whether adverse possession has been established and whether the reliefs sought are available.
14. The First Plaintiff testified that the registered proprietor of parcel number Isukha/Shirere/1XX6 are Elijah Kwame and Jeremiah Shivachi. I note that he annexed to his affidavit in support of the OS in Kakamega MC E&L No. 988 of 2018 a copy of a certificate of official search which confirms that the registered proprietors of the parcel are Elijah Kwame and Jeremiah Shivachi. That position is confirmed by the testimonies of DW1 and DW2. There is evidence on record that both Elijah Kwame and Jeremiah Shivachi are deceased.
15. The Plaintiffs have neither pleaded nor demonstrated that the First and Second Defendants are administrators or personal representatives of the estates of Elijah Kwame and Jeremiah Shivachi. Indeed, the First and Second Defendants have made it clear that they are not personal representatives of the said estates. Consequently, a cause of action against the estates of Elijah Kwame and Jeremiah Shivachi cannot be validly agitated against the First and Second Defendants. See *Trouistik Union International & another v Jane Mbeyu & another* [1993] eKLR and *CKM v ENM & another* (Civil Appeal 250 of 2019) [2024] KECA 293 (KLR) (8 March 2024) (Judgment).
16. The Court of Appeal stated in *Rugiri v Kinuthia & 3 others* [2024] KECA 1601 (KLR) thus:

Decided cases are in agreement that where a suit is filed relating to a deceased's estate without a grant of representation, the proceedings are null and void for want of locus standi. (See *Virginia Edith Wamboi vs. Joash Ochieng Ougo & Another* [1982-88] 1 KAR and *Trouistik Union International & Another vs. Jane Mbeyu & Another* Civil Appeal No. 145 of 1990). It follows, therefore, that for a party to have locus standi to institute or defend a case for and on behalf of a deceased person, he or she must first obtain a grant of letters of administration empowering him or her to administer the deceased's estate or a limited grant limited for the purpose of filing or defending the suit.
17. It follows therefore that the Plaintiffs' case against the First and Second Defendants is null and void for want of locus standi since it concerns proprietorship of parcel number Isukha/Shirere/1XX6 whose registered proprietors are deceased.
18. I now address the issue of whether adverse possession has been established. The law relating to adverse possession is found at Sections 7, 13, 17 and 38 of the Limitations of Actions Act. The Court of Appeal discussed ingredients of adverse possession in the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR where it stated that a party claiming adverse possession must assert hostile title in denial of the title of the registered proprietor. The process must start with a wrongful dispossession of the rightful owner and the proper way of assessing proof of adverse possession is whether the title holder has been dispossessed or has discontinued his possession for the statutory period of 12 years, as opposed to whether the claimant has proved that he or she has been in possession for 12 years. The party who claims adverse possession must demonstrate the date he came into possession, the nature of his possession, whether the fact of his possession was known to the registered proprietor and that the possession was open and undisturbed for the requisite 12 years.



19. The First Plaintiff testified that the Plaintiffs are not in occupation of parcel number Isukha/Shirere/1XX6 and that he was born and brought up in Muhonje where he has his home. He further testified that the First Respondent/Defendant and her family are in occupation and use of Isukha/Shirere/1XX6 and that he did not know when they started using the parcel. Possession is a key ingredient of adverse possession. A claimant who is unable to prove uninterrupted possession for the requisite period of 12 years cannot succeed in an adverse possession claim. The plaintiffs have failed to demonstrate, in respect of both suit properties, the date when they took possession, the nature of their possession and that the possession was open and undisturbed for the requisite 12 years.
20. Regarding parcel number Isukha/Shirere/1XX4, I note that the initial OS in respect of the parcel was brought against the Third and Fourth Defendants herein. In choosing the said Defendants, the Plaintiffs made it clear that according to them, the Third and Fourth Defendants were the title holders. As noted earlier, the Plaintiffs' case against the Third Defendant was dismissed.
21. The Fourth Defendant is a county government established pursuant to Article 176 of *the Constitution* of Kenya and the *County Governments Act*, 2012. A perusal of the register in respect of parcel number Isukha/Shirere/1XX4 shows that the registered proprietor is Kakamega County Council which is a predecessor of the Fourth Defendant. Parcel number Isukha/Shirere/1XX4 is therefore public land in view of Article 62 of *the Constitution* of Kenya. Pursuant to Section 41 of the *Limitation of Actions Act*, "Government land or land otherwise enjoyed by the Government," in other words public land, is precluded from acquisition by adverse possession. See *Kennedy Nyamumbo Sese v Settlement Fund Trustees & 2 others* [2017] eKLR and *Kuria Kiarie & 2 others v Sammy Magera* [2018] KECA 467 (KLR). Consequently, the Fourth Defendant cannot lose title to parcel number Isukha/Shirere/1XX4 through adverse possession.
22. In view of the foregoing, I find that adverse possession has not been established in respect of both suit properties. It follows therefore that the Plaintiffs' case is without merit and the reliefs sought are not available.
23. In the end, I dismiss the Plaintiffs' case. In view of the family relationship between the parties, I make no order as to costs.

**DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 15<sup>TH</sup> DAY OF MAY 2025.**

**D. O. OHUNGO**

**JUDGE**

