



Khaminwa (Suing as the Lawfully Appointed Administrator of the Estate of Charles Ford Khaminwa & another v Mulama & 6 others (Environment and Land Case E041 of 2022) [2025] KEELC 4488 (KLR) (16 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4488 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND CASE E041 OF 2022**

DO OHUNGO, J

JUNE 16, 2025

BETWEEN

VALENTINE KHAMINWA (SUING AS THE LAWFULLY APPOINTED ADMINISTRATOR OF THE ESTATE OF CHARLES FORD KHAMINWA) 1ST PLAINTIFF

ANTIONETTE KHAMINWA (SUING AS THE LAWFULLY APPOINTED ADMINISTRATOR OF THE ESTATE OF CHARLES FORD KHAMINWA) 2ND PLAINTIFF

AND

JOSEPH MIRIMO MULAMA 1ST DEFENDANT

EMILY MWENESI 2ND DEFENDANT

KENYATTA MULAMA 3RD DEFENDANT

ANTHONY MAJIMBO 4TH DEFENDANT

MANOAH MULAMA 5TH DEFENDANT

CLEMENT MIRIMO 6TH DEFENDANT

FLORENCE MULAMA 7TH DEFENDANT

JUDGMENT

1. The Plaintiffs moved the Court through Complaint dated 1st November 2022 in which they averred that they were administrators of the estate of Charles Ford Khaminwa (deceased) and that they brought this case for their own benefit as beneficiaries and on behalf of the said estate. They further averred that the deceased was their father and the registered proprietor of land parcel number Isukha/Shitochi/9X2



- (the suit property). That the Defendants had trespassed into the suit property, erected illegal structures thereon and leased or licensed it to third parties.
2. The Plaintiffs therefore sought judgment against the Defendants for:
 - a. A declaration that the Plaintiffs are the legal and beneficial owners of all that property known as Isukha/Shitochi/9X2 situated in Sigalagala, Kakamega County.
 - b. An order of Permanent Injunction to issue restraining the Defendants, their servants, agents, licensees, assigns and/or any other person claiming under their name and/or acting on their instructions restraining them from trespassing upon, occupying, accessing, remaining thereon and/or in any other manner interfering with the Plaintiffs ownership, possession and use of the property known as Isukha/Shitochi/9X2 situated in Sigalagala, Kakamega County.
 - c. An order of a mandatory injunction requiring the Defendants, their agents, servants, assigns, purported licensees or any other person acting under their name and instructions to forthwith remove all the illegal structures standing and being on the suit premises, remove any crops, cattle or any other buildings being and standing thereon and to vacate the property known as Isukha/Shitochi/9X2 and deliver the same in vacant possession to the Plaintiffs.
 - d. Pursuant to order (c) above, the Defendants to bear the cost of any removal of any illegal structures, standing and being on the suit property known as Isukha/Shitochi/9X2
 - e. That the Area Officer Commanding Station, Khayega area do assist in enforcing the Orders above and to ensure that peace and tranquillity is maintained at the suit premises Isukha/Shitochi/9X2 pursuant to orders of the Honorable Court.
 - f. Costs of this suit be borne by the Defendants.
 - g. Any other order or further relief the court deems fit to grant.
 3. The Defendants filed Statement of Defence and Counterclaim dated 30th November 2022 wherein they averred that the 4th and 6th Defendants do not reside on the suit property and that the 5th Defendant died in the year 2009. They denied the allegations of trespass, leasing and licensing and averred that they had been in uninterrupted use and occupation of the suit property with the knowledge of the deceased.
 4. In their counterclaim, the Defendants averred that they had been in peaceful use and occupation of the suit property since 1976 and that they have become entitled to the suit property by adverse possession. They therefore prayed for the following orders:
 - i. Dismissal of the Plaintiffs' suit with costs.
 - ii. That the defendants be declared to have become entitled to land parcel registration no. ISUKHA/SHITOCHI/9X2 by way of adverse possession.
 - iii. That the Plaintiffs' title to the said land be declared extinguished and or invalid/null & void and the defendants be declared the proprietors of land parcel registration no. ISUKHA/SHITOCHI/9X2.
 - iv. That the Plaintiffs' do execute the necessary documents to effect transfer of land parcel registration no. ISUKHA/SHITOCHI/9X2 in favour of the defendants.
 - v. That the defendants' (sic) be given costs of this suit.
 5. Valentine Blossom Vuragwa Khaminwa (PW1) testified that she is the First Plaintiff and an advocate of this Court. She adopted her witness statement dated 3rd December 2022 and produced copies of



- letters variously written by the deceased, herself or the deceased's advocates to the police and local administrators (P. Exhibits 1A to 1E), copies of green card, land certificate, and certificate of official search (P. Exhibits 2A to 2C) Grant of Letters of Administration Intestate in respect of the deceased's estate (P. Exhibit 4) and Certificate of Confirmation of Grant in respect of the deceased's estate (P. Exhibit 5). PW1 stated in her statement that the deceased was the registered proprietor of the suit property and that he passed away in the year 2017. That while the deceased was away in Zimbabwe, the Defendants invaded the suit property.
6. Under cross-examination and re-examination, PW1 testified that the Defendants are the deceased's clansmen and that they invaded the suit property in the 1990s. That owing to the relationship, the deceased did not evict them but purchased for them alternative land around 1997 which they instead subdivided and sold. She added that the Defendants were in occupation of the suit property as of the date of her testimony.
 7. Kizito Lisutsa (PW2) adopted his witness statement dated 3rd December 2022 and stated that the First Defendant is his paternal uncle and that the Defendants were not in occupation of the suit property when the deceased purchased it.
 8. Maurice Otunga Chibeyia (PW3) stated that he was a retired Assistant Chief of Mukango Sublocation and adopted his witness statement dated 8th February 2023. He stated that he knew the deceased, the First Defendant's father and the First Defendant. PW3 further stated that the deceased purchased land at Iloro for the First Defendant's father in 1996 so that the First Defendant's father could vacate the suit property.
 9. The Plaintiffs' case was then closed.
 10. The First Defendant Joseph Milimu Mulama (DW1) adopted his witness statement dated 30th November 2022 and produced copy of minutes of Ikolomani Division Land Control Board (D. Exhibit 1), copy of register in respect of the suit property minutes (D. Exhibit 2), and copy of register in respect of Kakamega/Shitochi/1XX6 (D. Exhibit 3).
 11. DW1 stated that the suit property initially belonged to one Andrew Isutsa Isabwa who exchanged it in 1974 with parcel number Kakamega/Shitochi/1XX6 which was owned by DW1's father. That DW1's family took immediate possession of the suit property and that Andrew Isutsa Isabwa passed away before transferring the suit property to DW1's father. He added that the deceased was his cousin and that he was shocked to learn that the deceased was the registered proprietor of the suit property, yet his family had been in uninterrupted occupation for over fifty years. DW1 further testified that he has land at Iloro and that he had been in occupation of the suit property since 1982.
 12. The Second Defendant Emily Mwenesi Magotswe (DW2) stated that the First, Third, Fourth, Fifth and Seventh Defendants are her in laws and that her husband who was called Zakaria Mulama and was a brother to the First Defendant passed away. She adopted her witness statement dated 30th November 2022 and added that her husband was buried on the suit property and that she was in occupation of the suit property as of the date of her testimony.
 13. Laurence Murunga Shamwama (DW3) adopted his witness statement dated 30th November 2022. He stated that he knew the Defendants and that he had been a Village Elder from 1987 to 2017. He added that there was a land exchange transaction and that the defendants had been in occupation of the suit property since 1976.
 14. Lastly, the Seventh Defendant Florence Mulama Milimo (DW4) adopted her witness statement dated 30th November 2022 and stated that the First, Third, Fourth and Fifth Defendants are her sons while



- the Second Defendant is her Daughter in Law and the Sixth Defendant is her nephew. She added that the Fifth Defendant passed away, that her husband was called Bernard Mulama Milimu and that the deceased was her brother.
15. DW4 further testified that she lived with her husband on the suit property and that her husband was buried on the suit property. That her husband exchanged land with Andrew Isutsa. She went on to state that neither her nor her children followed up to obtain title from Andrew Isutsa and that they have land at Iloro which is registered jointly in her name, her husband's name and the First Defendant's name.
 16. The Defendants' case was then closed, after which directions for filing and exchange of written submissions were issued. The Plaintiffs filed submissions dated 13th January 2025 and supplementary submissions dated 20th February 2025 while the Defendants filed submissions dated 15th January 2025.
 17. I have carefully considered the pleadings, evidence and submissions in this matter. There is no dispute that Charles Ford Khaminwa (deceased) is the registered proprietor of the suit property. The certified copies of the register which were produced by both the Plaintiffs and the Defendants show that he was registered as proprietor on 27th May 1982 and that land certificate was issued to him. There is also no dispute that Defendants are in occupation of the suit property and have been in such occupation since the 1990s.
 18. Beyond their adverse possession claim, the Defendants have not challenged the deceased's title to the suit property at all. Thus, the issues for determination are whether adverse possession has been established and if not, whether the reliefs claimed by the Plaintiffs should issue.
 19. The law on adverse possession is well settled. It is founded on Sections 7, 13, 17 and 38 of *Limitation of Actions Act*. In *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, the Court of Appeal 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.
 20. As noted earlier, there is no dispute that Defendants have been in occupation of the suit property since the 1990s. Nevertheless, possession alone, however prolonged, does not amount to adverse possession. The claimant must have entered the suit property without the permission of the proprietor and must remain in possession as owner in contradistinction to holding in recognition of or subordination to the true owner or to a recognized superior claim of another. See *Munyanya v Keya* [2024] KECA 1831 (KLR). Further, any occupation pursuant to a contractual or sale transaction does not amount to adverse possession unless the claimant has fully paid the purchase price. See *Public Trustee v Wanduru Ndegwa* [1984] eKLR.
 21. The Defendants case is that they entered the suit property under an exchange transaction between Bernard Mulama Milimu and Andrew Isutsa pursuant to which they gave the latter parcel number Kakamega/Shitochi/1XX6 in exchange for the suit property. They produced certified copies of the registers in respect of both parcels as well as copy of minutes of Ikolomani Division Land Control Board. A perusal of the register in respect of Kakamega/Shitochi/1XX6 shows that the registered proprietor is still Mulama Milimu. Needless to restate, the deceased has been the registered proprietor



of the suit property since 27th May 1982 and remains such proprietor. Put differently, the consideration for any alleged exchange has not passed and the parties are still at the contractual stage in regard to any exchange arrangement. That much is also confirmed by the minutes of Ikolomani Division Land Control Board where it is stated that an application by Andrea Lisutsa to transfer the suit property to the deceased was deferred pending investigations.

22. As long as the parties are in the contractual stage with regard to the alleged exchange agreement, time cannot run in favour of the Defendants for purposes of adverse possession.
23. There is as yet one more aspect of the nature of the Defendants' possession which renders adverse possession inapplicable. It is not in dispute that the Defendants are closely related to the deceased. As can be seen from the Seventh Defendant's testimony, the deceased was her brother. It follows therefore that the deceased was the uncle of the First to Sixth Defendants.
24. In *Samuel Kihamba v Mary Mbaisi* [2015] eKLR, the Court of Appeal considered whether adverse possession could apply within families and against close relatives. The Court stated:

The suit filed by the respondent against the appellant was founded on adverse possession where the respondent claimed to have acquired adverse rights over the suit land having occupied the same for over twelve years. Could the doctrine of adverse possession apply against the parties to the suit before the learned Judge who were related by being mother and step-son? We think not. We are persuaded by various dicta which we have quoted and relied upon in this judgement and must state that it would create havoc for families and the society of Kenya generally if the principle of adverse possession applied within families against close relatives.

25. In view of the foregoing discourse, I find that the Defendants have not established adverse possession.
26. The deceased's estate remains the registered proprietor of the suit property. A registered proprietor of land is guaranteed protection of his right to property pursuant to Article 40 of *the Constitution*. Further, protection is accorded to a proprietor through Section 24 of the *Land Registration Act* as follows:

Subject to this Act—

- (a) 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; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
27. There is evidence on record that the deceased died on 21st September 2017 and that on 7th September 2021 Grant of Letters of Administration Intestate in respect of his estate was issued to Mary Aseyo Khaminwa, Ralph Aubrey Wishenga Khaminwa, Valentine Blossom Vuragwa Khaminwa and Antoinette Fleur Ilamoga Khaminwa HC Succession Cause No. E1074 of 2021 (Nairobi). The grant was later confirmed and Certificate of Confirmation of Grant issued on 25th April 2022. The suit property is listed in the Certificate of Confirmation of Grant and is to be shared equally by the listed heirs.



28. In their capacity as personal representatives of the deceased's estate, the Plaintiffs are entitled to and in fact have a duty to preserve the suit property by obtaining vacant possession from the Defendants who have openly admitted being in occupation thereof. Even though the defendants claimed that the Fifth Defendant is deceased, nothing was placed before the Court to prove his death.
29. In the result, I find merit in the Plaintiffs' case. On the other hand, the Defendants' counterclaim is without merit. I make the following final orders:
- a. The Defendants' counterclaim is dismissed.
 - b. A declaration is hereby issued that the estate of Charles Ford Khaminwa (deceased) is the legal and beneficial owner of all that property known as Isukha/Shitochi/9X2 situated in Sigalagala, Kakamega County.
 - c. An order of mandatory injunction is hereby issued requiring the Defendants, their agents, servants, assigns, licensees or any other person acting under their name and instructions to remove all the illegal structures, crops, cattle and buildings standing on the parcel of land known as Isukha/Shitochi/9X2 and to vacate the said parcel and deliver the parcel in vacant possession to the Plaintiffs within 90 (ninety) days from the date of delivery of this judgment.
 - d. Pursuant to order (c) above, the Defendants to bear the cost of removal of any illegal structures standing on the parcel of land known as Isukha/Shitochi/9X2.
 - e. An order of Permanent Injunction is hereby issued restraining the Defendants, their servants, agents, licensees, assigns and/or any other person claiming under their name and/or acting on their instructions from trespassing upon, occupying, accessing, remaining thereon and/or in any other manner interfering with the estate of Charles Ford Khaminwa's (deceased's) ownership, possession and use of the parcel of land known as Isukha/Shitochi/9X2 situated in Sigalagala, Kakamega County.
 - f. The Officer Commanding Station, Khayega to ensure that law and order is maintained during the enforcement of the above orders.
 - g. Each party to bear own costs of the suit.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 16TH DAY OF JUNE 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Mr Amalemba for the Plaintiffs

No appearance for the Defendants

Court Assistant: B Kerubo

