



**Moindi v Siro & another (Civil Appeal 226 of 2019)  
[2025] KECA 1630 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1630 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 226 OF 2019  
HA OMONDI, LK KIMARU & JM NGUGI, JJA  
OCTOBER 3, 2025**

**BETWEEN**

**ELIJAH NYAKUNDI MOINDI ..... APPELLANT**

**AND**

**VINCENT TUMBO SIRO ..... 1<sup>ST</sup> RESPONDENT**

**HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment of the Environment and Land Court at Kisii (Mutungi, J.) dated 24th May, 2019 in ELC Case No. 1200 of 2016 Formerly HCC No. 285 of 2010)*

**JUDGMENT**

1. The 1<sup>st</sup> respondent herein instituted a suit as the personal legal representative of Paul Siro Mogaka (deceased) vide a plaint dated 8<sup>th</sup> October, 2010, in Environment and Land Court Case No. 1200 of 2016 formerly High Court Case No. 285 of 2010, claiming fraud with respect to issuance of an extended lease for Parcel No. Kisii Town/Block II/66, originally known as Plot L.R No. 1436/19/VII Kisii Township (hereinafter “suit property”), by the Commissioner of Lands and sought the following orders against the defendants jointly and severally:
  - a. A declaration that Siro Mogakais still the owner of 1/3 share of the suit land N. Kisii Town/Block II/66.
  - b. An order directing the Commissioner of Lands to rectify the extended lease of the suit property to include the name of Siro Mogaka as one of the proprietors in common in equal shares.
  - c. A permanent injunction restraining the 1<sup>st</sup> defendant, his agents and/or servants from in any way interfering with the 1/3 share of Siro Mogaka and/or his tenants on the same.



- d. Costs of this suit.
  - e. Any other relief as the Court may deem fit to grant.
2. The dispute before the trial court centered on whether the late Siro Mogaka, the respondent's father, held a one-third (1/3) share in the suit property as a co-owner alongside the other registered proprietors. The respondent's case was that the late Siro Mogaka had been admitted as a partner and co-proprietor in the 1960s, had paid his share of consideration, and was duly registered in 1982 as holding a one-third undivided interest in the suit property. He contended that the omission of his father's name in subsequent records, including the renewal of lease in 2008, was unlawful and fraudulent.
  3. The appellant resisted the claim, denying Mogaka's proprietorship, alleging fraud in his registration, and asserting that the 2008 renewed lease reflected the correct position — that the property belonged to the appellant and the other registered party only.
  4. The case proceeded to full trial in which the respondent testified and called two witnesses. The appellant also testified and called one witness in support of his case while the Kisii Land Registrar testified on behalf of the 2<sup>nd</sup> respondent.
  5. The respondent's case was anchored on the history of the suit property and documentary evidence. During the trial, the respondent produced, PEx.1, a certificate of registration of business name dated 11<sup>th</sup> January 1958 which showed that Johnson Matundura (Matundura), Sospeter Moindi (Moindi), and Siro Mogaka (Mogaka) carried on business under the style "Johnson Matundura & Co."
  6. By a letter dated 16<sup>th</sup> August 1964 (PEx.2), Matundura and Moindi requested the Commissioner of Lands, through the Kisii Land Registrar, to include Mogaka as co-proprietor of the suit property, expressly acknowledging him as a "shareholder" since 1953 who had contributed Kshs. 9,000/=. Their advocate, Mr. Dhanwant Singh, followed up with a letter dated 16<sup>th</sup> February 1965 (PEx.3) seeking consent for transfer of a one-third share to Mogaka for Kshs. 20,000/=. The Commissioner of Lands granted written consent on 6<sup>th</sup> March 1965 (PEx.4).
  7. Thereafter, a duly executed transfer of lease dated 10<sup>th</sup> July 1980 (PEx.5) was presented and registered on 1<sup>st</sup> April 1982, and the green card (PEx.6) was updated to reflect Mogaka as proprietor of a one-third share. A Certificate of Lease issued the same day (PEx.7) bore the names of all three proprietors.
  8. Upon expiry of the initial 33-year lease on 31<sup>st</sup> May 1986, the proprietors applied for renewal. By a letter of allotment dated 8<sup>th</sup> April 1987 (PEx.8) addressed to "Johnson Matundura & Others," the Commissioner granted a fresh 99-year lease effective 1<sup>st</sup> June 1953. The Environment and Land Court found, and the documentary evidence confirmed, that "others" referred to Mogaka and Moindi.
  9. Following Matundura's death, his widow, Theresia Nyaechero Matundura, was registered by transmission on 28<sup>th</sup> November 1994 as proprietor of his one-third share (PEx.9). The position was confirmed in an official search dated 12<sup>th</sup> May 2005 (PEx.10) which reflected the three co-owners in equal shares.
  10. The controversy arose after Mogaka's death in 2008. The appellant, acting as personal representative of Moindi's estate, denied Mogaka's co-ownership and alleged fraud in his registration. The appellant relied heavily on a renewed lease dated 11<sup>th</sup> January 2008 (DEx.1), issued in the names of Matundura and Moindi only.
  11. DW3, the Land Registrar Kisii, testified that records at the Lands office showed that land parcel Kisii Municipality/Block II/66 was registered on 18<sup>th</sup> August 2016 in the names of Elijah Nyakundi Moindi



and Anne Ondiek as joint owners pursuant to Succession Cause No. 584 of 2015. He, however, noted that the Lands office had no documents relating to that succession cause. A Certificate of Lease was subsequently issued in their favour.

12. He explained that prior to this registration, the lease issued from Nairobi on 4<sup>th</sup> November 2009 reflected Johnson Matundura and Sospeter Moindi as joint tenants in equal shares. Significantly, he testified that on 10<sup>th</sup> July 1980, Siro Mogakahad been added to the lease as the third co-owner, giving each of the three an equal 1/3 share of the property. A transfer of this undivided 1/3 share was duly executed, stamped, and voluntarily signed by the original owner. Consequently, a Certificate of Lease issued on 1<sup>st</sup> April 1982 carried the names of all three co-owners, including Siro Mogaka.
13. The Land Registrar clarified that upon renewal of the lease, the old lease was surrendered, but the renewed lease omitted the name of Siro Mogaka. He attributed this omission to the Nairobi records not having been updated, and emphasized that there was no instrument showing that Siro Mogakahad ever relinquished his interest. In his professional view, the renewed lease ought to have included Siro Mogaka's name, and its omission amounted to a mistake.
14. He further explained that the letter of allotment of 1987, which renewed the lease for 99 years from 1953, was intended merely to extend the existing lease and did not extinguish the rights of the existing co-owners.
15. DW3 concluded his testimony by producing the full set of documents contained in the parcel file for the suit property, all of which he referred to during his evidence.
16. The trial court carefully considered the oral and documentary evidence tendered. It held that the evidence presented by the respondent was cogent and demonstrated a lawful process through which Mogaka acquired a one-third interest in the suit property. The court emphasized the contemporaneous documents, particularly the 1964 and 1965 correspondence, the Commissioner's consent of 1965, the transfer of lease registered in 1982, and the Certificate of Lease issued the same day, all of which consistently affirmed Mogaka's ownership.
17. On the issue of fraud, the trial court held that fraud must be specifically pleaded and proved to a standard above a balance of probabilities and that no such proof was adduced by the appellant. The trial court further found that the 2008 lease, which excluded Mogaka's name, was irregular, as it purported to include Johnson Matundura long after his death, ignored the lawful registration of his widow by transmission in 1994, and was never validly executed or registered.
18. The court concluded that (the estate of) Mogaka remained a lawful one-third proprietor of the suit property, and ordered rectification of the register to reflect his name alongside the other co-owners.
19. Aggrieved, the appellant lodged this appeal raising six grounds, namely that the Learned Trial Judge erred in law and fact and listed six grounds of appeal as follows:
  1. The Learned Trial Superior Court Judge erred in law and fact by failing to appreciate the law and evidence tendered in court.
  2. The Learned Trial Superior Court Judge erred in law and fact in holding that the plaintiff/respondent held a 1/3 share of the suit property as partner.
  3. The Learned Trial Superior Court Judge erred in law and fact by holding that there was no evidence of any fraud in the registration of SIRO MOGAKA's name in the suit property.



4. The Learned Trial Superior Court Judge erred in law and fact by ordering the rectification of the register in KISII TOWN BLOCK 11/66 to include the name of Siro Mogaka as the owner of 1/3 undivided share of the suit property.
  5. The Learned Trial Superior Court Judge erred in law and fact by holding that the renewed lease of 11<sup>th</sup> January, 2008 was invalid, null and void contrary to the documents obtained from the commissioner of lands.
  6. The Learned Trial Superior Court Judge erred in law and fact by holding that as at the time of renewal of the lease, there were three registered owners each holding a 1/3 share of the suit property.
20. This is a first appeal in which we are required to review issues of both facts and law afresh and come to our own independent conclusions. We are, however, obligated to bear in mind that the trial judge had the advantage of seeing and assessing the demeanor of witnesses. (See *Selle vs. Associated Motor Boat Co. Limited* (1968) EA 123). In addition, this Court must be cognizant of the fact that it should not interfere with the findings of fact by the trial court unless they were based on no evidence or on a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on wrong principles in reaching his findings. (See *Jabane vs. Olenja* (1968) KLR 661).
  21. During the virtual hearing of the appeal, learned counsel, Mr. Nyambati appeared for the appellant and learned counsel, Mr. Masese appeared for the 1<sup>st</sup> respondent. There was no appearance for the 2<sup>nd</sup> respondent during the hearing. Both parties filed written submissions which they relied on.
  22. The appellant anchored his appeal principally on the assertion that Siro Mogaka's acquisition of a one-third share in the suit property was irregular and unsupported by proper documentation. He contended that since Mogaka was not one of the original allottees, his inclusion could only be justified by a valid and enforceable conveyance. According to the appellant, no such transaction was demonstrated. The respondent's reliance on alleged payments of Kshs. 20,000/= as consideration and a partnership contribution of Kshs. 9,000/= was, in his view, wholly inadequate because there was no documentary proof of such payments.
  23. To buttress this point, the appellant invoked section 3(3) of the *Law of Contract Act*, as it stood in 1965 when the correspondence regarding Mogaka's inclusion was generated. He emphasized that, at the time, the law expressly prohibited enforcement of contracts for the disposition of land unless the contract was in writing, signed by all parties, and attested by witnesses. Since no such formal instrument was produced, the appellant insisted that Mogaka could not have acquired any lawful interest.
  24. The appellant further challenged the authenticity of the documentary evidence relied upon by the 1<sup>st</sup> respondent. He argued that one of the letters was not even related to the suit property but to a separate business arrangement, while the other was suspicious in form and content, lacking an advocate's letterhead and any cross-references to earlier correspondence. He cast doubt on the very existence of the advocate allegedly involved, maintaining that there was no proof that the original allottees had instructed him. Likewise, the letter said to be from the Commissioner of Lands was faulted for being unsigned, for failing to acknowledge earlier correspondence from the allottees, and for not being copied to them. In the appellant's view, these deficiencies suggested fabrication.
  25. The appellant also argued that the burden of proving Mogaka's legitimate entry into the title lay squarely on the 1st respondent.

Mere reliance on partnership records or letters of questionable authenticity, he submitted, did not discharge that burden. He reinforced his argument by pointing out that Sospeter Moindi himself once



- filed Kisii HCCC No. 130 of 2005, challenging Mogaka's name in the title as fraudulent. Though the case was later withdrawn, the appellant argued that Moindi only did so after securing a renewed lease which excluded Mogaka's name — an omission which, in the appellant's submission, was a tacit admission of fraud.
26. In reply, the 1<sup>st</sup> respondent associated himself with the arguments made before the trial court and placed the dispute within its historical context. He argued that as early as 11<sup>th</sup> January 1958, a partnership had been duly registered between Johnson Matundura, Sospeter Moindi, and Siro Mogaka, pursuant to a certificate of registration produced in evidence. He submitted that Mogaka's status as a trading partner explained and justified his eventual incorporation into the ownership of the suit property.
  27. The respondent further stated that following the establishment of the partnership, the original allottees of the suit property formally wrote to the Commissioner of Lands requesting that Mogaka be registered as a co-owner. He maintained that this request was duly acted upon, and that by 10<sup>th</sup> July 1980, the records reflected Mogaka as holding a one-third undivided share. This culminated in the issuance of a Certificate of Lease on 1<sup>st</sup> April 1982, which bore the names of Johnson Matundura, Sospeter Moindi, and Siro Mogaka as co-owners.
  28. He conceded that the property was originally allotted to Matundura and Moindi but argued that they voluntarily opted to include Mogaka, both as partner and co-owner. The respondent submitted that the central issue was not whether Mogaka was an original allottee, but whether his inclusion as a co-owner was fraudulent. On this point, he relied heavily on the testimony of DW3, the Land Registrar, who confirmed that the transfer was voluntary, properly executed, and duly registered, and that the subsequent omission of Mogaka's name in the renewed lease was an administrative oversight.
  29. To further reinforce his case, the respondent referred to the letter of allotment dated 13<sup>th</sup> April 1987, which extended the lease for 99 years. He noted that soon thereafter, following the death of Matundura, his widow Teresa Nyaechero Matundura was properly substituted on the title. This was corroborated by the official search dated 12<sup>th</sup> May 2005, which reflected the registered owners as Teresa Matundura, Sospeter Moindi, and Siro Mogaka, and by the certificate of lease issued on 10<sup>th</sup> March 2005, which similarly bore Mogaka's name.
  30. The respondent argued that these records conclusively demonstrated Mogaka's co-ownership, and that the omission of his name in the 2009/2010 renewal process could not negate a registered interest that had subsisted since 1982. He dismissed the appellant's suggestion that the lease expired in 2006 and that Mogaka's name "vanished" during renewal, pointing out that even as late as 2005, Mogaka's name appeared in official records and was acknowledged in pleadings filed by Moindi himself.
  31. We have considered the grounds of appeal, the submissions of counsel, the evidence, and the law. The central issue is whether the trial court erred in holding that the late Siro Mogaka was a lawful one-third co-owner of the suit property and whether the 2008 lease affected his interest.
  32. On the question of co-ownership, the documentary record (PEx.1– PEx.7) establishes a consistent and lawful process by which the late Mogaka was included as a proprietor. The 1964 and 1965 correspondence, the Commissioner's written consent, the registered transfer of lease in 1982, and the contemporaneous certificate of lease all confirm his entitlement. The appellant's allegation of fraud was unsupported by evidence. As the trial judge correctly noted, fraud must be specifically pleaded and proved to a standard higher than a balance of probabilities. No such evidence was presented.
  33. The appellant's reliance on the 2008 lease (DEx.1) was misplaced. PW2, the Land Registrar, testified that the omission of Mogaka's name was erroneous. The lease was further tainted by the fact that it bore the name of Johnson Matundura, who had died years earlier, and ignored the registered transmission



to his widow in 1994 (PEx.9). Moreover, the lease was not duly executed or registered. The trial court properly found it irregular and incapable of defeating vested interests reflected in the register.

34. The record also shows that at the time of renewal in 1987, the three proprietors—Matundura, Moindi, and Mogaka—were co-owners (PEx.8). This was further confirmed by the 2005 official search (PEx.10). The trial court’s conclusion that there were three registered owners each holding a one-third share was therefore firmly supported by evidence. This is what the learned Judge said in his final analysis:

“32. The Land Registrar in his evidence before the Court stated that after Siro Mogakawas registered as a co-owner of the suit property, there was no instrument in their records to show that he at any time thereafter relinquished his interest in the property or ceased to be one of the owners of the suit property. Once he had been registered as an owner, he could only have ceased to be an owner if he transferred his interest and share to somebody else and there was no evidence that he did so. The Land Registrar stated that the omission of the name of Siro Mogakain the new lease was a mistake and further stated the new lease purportedly issued in 2008 ought to have been issued in the name of Theresa Nyachero Matundura and not Johnson Matundura as she had already substituted her husband in 1994 through succession. It is my finding in the circumstances that the renewed lease issued on 11<sup>th</sup> January 2008 (“DEx.5”) in the names of Johnson Matundura and Sospeter Moindi was irregularly issued to the extent that it omitted the name of Siro Mogakaand was also issued in the name of Johnson Matundura who was deceased and had been substituted by his wife. It is also important to note that the lease is not shown to have been executed by the lessees nor registered by the Land Registrar. Johnson Matundura could not of course execute the lease since he had been along dead. The 1<sup>st</sup> Defendant produced an abstract of title (green card) for the property which showed the register was opened on 4<sup>th</sup> November 2009 when Johnson Matundura and Sospeter Moindi were registered owners of the property and a Certificate of Lease issued (entries 1 and 2 respectively). There is nothing to support these entries and/or to explain what had happened to the register that had been opened on 8<sup>th</sup> August 1972 [sic]. The opening of the new register was irregular as already a register for the property existed. My view is that somebody must have been involved in the manipulation of the records to obscure the true and authentic records relating to the suit property.

33. From the foregoing analysis, it is clear the lease of the suit property was renewed and/or extended after the initial lease expired in 1986 and that as at the time of the renewal of the lease the registered owners were Johnson Matundura, Sospeter Moindi and Siro Mogakawith each holding 1/3 share in the property. The lease issued on 11<sup>th</sup> January 2008 was invalid and null and void. The lease in my view was renewed in furtherance of the letter of allotment issued on 8<sup>th</sup> April 1987 in consequence whereof Theresa Matundura, Sospeter Moindi and Siro Mogakawere registered as owners on 28<sup>th</sup> November 1994.”

34. On the issue whether Siro Mogaka’s name was fraudulently included as one of the owners of the suit property, my answer must be in the negative. No evidence of any fraud has been adduced to support the allegation. The 1<sup>st</sup>



Defendant (DW1) and DW2, William Okoba Matundura merely alleged fraud against the inclusion of Siro Mogaka's name as a co-owner. Their primary reasons were that the initial lease was only in the names of Johnson Matundura and Sospeter Moindi and further that the renewed lease was only issued in the same names. Apart from that the 1<sup>st</sup> Defendant stated that his late father had brought a suit Kisii HCCC No. 130 of 2005 against Siro Mogaka challenging his inclusion as a co-owner of the suit property. This suit was withdrawn by the 1<sup>st</sup> Defendant's late father before it was heard and determined on merits. I have reviewed and considered the evidence and I have held that Siro Mogaka was properly and legally included as a co-owner of the suit property. It is my finding that the allegations of fraud were not established and/or proved to the required standard and thus remain as mere allegations."

35. We have cited the judgment at length because we fully agree with the careful analysis and determination of the learned trial judge. We are satisfied that the learned Judge carefully evaluated the evidence and applied the correct legal principles. We have reweighed the evidence and the law and we are unable to reach a contrary conclusion. We find no error in principle.
36. The upshot is that we find no basis for interfering with the judgment and order of the Environment and Land Court. Accordingly, we are satisfied that this appeal lacks merit. We hereby dismiss it with costs to the 1<sup>st</sup> respondent.

**DATED AND DELIVERED AT KISUMU THIS 3<sup>RD</sup> DAY OF OCTOBER, 2025.**

**H. A. OMONDI**

**JUDGE OF APPEAL**

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**L. KIMARU**

**JUDGE OF APPEAL**

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**JOEL NGUGI**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

