



Musya v Kivai (Sued as the Legal Administrator of the Estate of the Late Kivai Vonde) (Environmental and Land Originating Summons E007 of 2023) [2025] KEELC 7322 (KLR) (28 October 2025) (Judgment)

Neutral citation: [2025] KEELC 7322 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E007 OF 2023
AY KOROSS, J
OCTOBER 28, 2025**

BETWEEN

JOHN SILLA KINYAMASYO MUSYA PLAINTIFF

AND

PRISCILLA NGUSYA KIVAI (SUED AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE KIVAI VONDE) DEFENDANT

JUDGMENT

1. This suit is instituted by an originating summons (OS) dated 27/03/2023, in which the plaintiff seeks to be deemed an adverse possessor of a portion measuring 65 ft by 120 ft of land parcel no. L.R. Muputi/Kiima-Kimwe/2511 (“disputed portion”) that is registered in the deceased defendant’s name. In this OS, the plaintiff seeks the following reliefs from this court: -
 - a. A declaration that by virtue of actual possession and use, the plaintiff is entitled through adverse possession to ownership of the disputed portion.
 - b. The plaintiff be registered as the proprietor and/or owner of the disputed portion in place of the deceased defendant.
 - c. In the alternative, a declaration that the claimant is entitled through the doctrine of constructive trust to the disputed portion.
 - d. Costs of the suit.
2. The OS is supported by grounds on the face of the OS and affidavits deposed on diverse dates of 27/03/2023 and 14/12/2023 by the plaintiff. Reliance is also placed on several documents annexed to these affidavits, which were also produced during the hearing, whereby the plaintiff was the sole witness and testified as PW1. These annexures were marked and produced as Pex. 1-5.



3. During the hearing, which proceeded as an undefended suit, it was the plaintiff's evidence that he had lived on the disputed portion openly, peacefully and uninterrupted for more than 30 years and that he acquired the disputed portion, which at the time was within LR. Muputi/Kiima-Kimwe/2489 (mother parcel) through purchase. He informed the court that his purchase was for valuable consideration through an agreement for sale in the year 1984 that was between him and Teresia Mbithe (deceased), as evidenced by Pex. 1.
4. According to him, the mother parcel was subdivided in 1988 to create LR. Muputi/Kiima-Kimwe/2511 and 2512, but the disputed portion lay within the former, and to substantiate these, he produced as Pex. 2, the green cards thereof. He informed the court that immediately after purchase, he took possession and constructed permanent structures as evidenced by the bundle of photographs and a surveyor's report (Pex. 3 and 4). He stated that, unfortunately, when the deceased defendant purchased a portion of LR. Muputi/Kiima-Kimwe/2511 from Teresia Mbithe, he caused the entire land to be registered to himself without transferring the disputed portion to the plaintiff. Worse, the widow of the deceased defendant and legal administrator of his estate in Nairobi HCSC No. 1054 of 2005 (probate case) failed to disclose his (plaintiff's) interests in the disputed portion. See Pex. 4.
5. Thereafter, after closing the plaintiff's and defendant's cases with the latter not attending court despite service, the court directed the parties to canvass their arguments by way of written submissions. In compliance, the plaintiff's law firm on record, Ms Maingi Musyimi & Associates, Advocates, filed their written submissions dated 2/04/2025, where counsel urged this court to allow the reliefs sought in the OS.
6. Accordingly, upon identifying and considering the issues for determination, this court will, in its analysis and determination, consider the plaintiff's counsel's arguments on the particular issue and also consider provisions of the law and judicial precedents they relied upon to advance their arguments.
7. Thus, having considered the pleadings, evidence, and plaintiff's written submissions, the following issues, which arise for determination, shall be handled consecutively, in this court's analysis and determination: -
 - I. Whether reliefs of adverse possession and constructive trust can be sought in one suit.
 - II. Whether the plaintiff's claim met the legal threshold.

I. Whether reliefs of adverse possession and trust can be sought in one suit.

8. It is unfortunate that despite seeking reliefs of adverse possession and constructive trust, the suitability of seeking both reliefs in a singular suit was never addressed by the plaintiff's counsel's written submissions. Instead, counsel urged this court to grant either of these reliefs since, according to counsel, the plaintiff's claim had met the legal threshold of both.
9. Nonetheless, it is trite law that claims of adverse possession are non-suited with claims of fraud or trust. This position of law has been pronounced in several court decisions, including *Njue v Matiabe & 3 others (Environment & Land Case E050 & E010 of 2021 (Consolidated))* [2023] KEELC 17361 (KLR) (11 May 2023) (Judgment), which held as follows: -

“...the moment the person claiming adverse possession contests and impugns the validity of the registered proprietors title, the claim for adverse possession is defeated and thus becomes legally untenable. In such a situation, the claimant is at liberty to pursue a cause of action for fraud or better still, trust, which causes of action are antithetical to and cannot co-exist with a claim for adverse possession.



103. To buttress the position that one cannot implead fraud and adverse possession or better still trust and adverse possession in the same cause of action; it is instructive to take cognizance of the holding of the Court of Appeal in the case of Catherine Koriko & 3 Others v Evaline Rosa (2020)eKLR”

10. Being guided by judicial precedence, this court has nothing more to say on issue (II) and finds the suit is incompetent and hereby strikes it out with the plaintiff bearing his own costs.

Judgment accordingly.

DELIVERED AND DATED AT MACHAKOS THIS 28TH DAY OF OCTOBER, 2025.

HON. A. Y. KOROSS

JUDGE

28. 10.2025

**JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERCING PLATFORM**

In the presence of;

Ms Kanja Court Assistant.

M/s Wambua for plaintiff.

N/A for defendant.

