



**Akola v Akola & another (Environment & Land Case 262 of 2016)
[2025] KEELC 970 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 970 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 262 OF 2016
AA OMOLLO, J
FEBRUARY 27, 2025**

BETWEEN

MADRID ANDIA AKOLA PLAINTIFF

AND

WYCLIFFE MURUNGA AKOLA 1ST DEFENDANT

GEORGE SHIVACHI AKOLA 2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit vide plaint dated 17th March 2016 seeking the following orders
 - a. A declaration that the Plaintiff is the absolute sole and legal proprietor of property known as Plot No. A4-670 Kayole situate within the County of Nairobi.
 - b. A permanent injunction restraining the Defendants by themselves, their agents, servants and anyone claiming through them from trespassing, erecting structures and/or in any other manner whatsoever dealing with the Plaintiff's property known as Plot No. A4-670 Kayole situate within the County of Nairobi.
 - c. An account of rental income collected from the suit property and a refund of the same with interest at commercial rates.
 - d. Damages for trespass
 - e. Cost of this suit and interest at court rates from the date of judgement until payment in full.
 - f. Any other relief this Honourable Court may deem fit to grant in the circumstances of this case.
2. The Plaintiff stated that at all material times, she is the registered properitor of property known as Plot No. A4-640 KAYOLE situate within the County of Nairobi (herein after referred to as "the suit



property”). That she acquired it sometime in 1984 by way of purchase from the City Council of Nairobi and was issued with a Plot Card which evidenced her ownership of the same.

3. That the plots at Kayole were part of a Tenant Purchase Housing Project developed by the City Council of Nairobi for the benefit of low-income residents of Nairobi and the beneficiaries were determined through public balloting to which every person was invited through announcements.
4. The Plaintiff stated that she proceeded to develop the suit property over time and has constructed thereon small houses which are rented out. The Defendants in total contravention of her rights purported to usurp the position of a landlord on the suit property and collects rent from tenants thus necessitating the filing of this suit.

Defendants defence & Counter claim

5. The Defendants filed a joint statement of defence and counter claim dated 14th December 2021 and amended on 5th February 2024 seeking for the following orders;
 1. Dismissal of the suit by the Plaintiff with costs
 2. For judgement against the Plaintiff in the following terms;
 - a. A declaration that Plot A4/670 Kayole was purchased by the late Moses Musi Akola and the Plaintiff simply holds trust for the estate of the late Moses Musi Akola; and
 - b. An order that the records at the Nairobi City County and/or Lands office be rectified to indicate Moses Musi Akola as the lawful owner.
 3. Costs of the suit and the Counterclaim to the Defendants.
6. The Defendants have denied that the Plaintiff is a bona fide purchaser and asserted that the Suit Property was purchased by their father, Moses Musi Akola, in trust for the family. They state that the property was purchased when the Plaintiff was only 17 years old and had no income to buy as alleged and demand strict proof.
7. It is their claim that the Suit Property was allocated through public balloting by the City Council of Nairobi, and their father chose to register it in the Plaintiff’s and 2nd Defendant’s names to represent both families in trust. The Defendants argue that the allotment card does not prove ownership and denied that the Plaintiff developed the suit property demanding strict proof thereof.
8. The Defendants aver that rent was collected by their late father, who was the rightful landlord, and the Plaintiff never objected. Further, they deny that any notice of intent to sue was issued.
9. In the Counter claim, the Defendants reiterate their contents of their defense, stating that in 1984, their late father used the Plaintiff’s name to obtain the Suit Property and that he paid the full price himself. It is the defendants’ averment that their father built rental houses on the suit property, where he and the Defendants lived from the 1990s until his death in 2012. That the Plaintiff having moved out in the early 2000, the Defendants continued to reside on the property, paying electricity bills and land rates.
10. They impleaded of no other pending suit on the matter except for Eldoret HCP&A Cause No. 5 of 2013 (in the estate of Moses Musi Akola), However, they state that the ownership dispute was only a side issue in that case, and since they were not parties to it, the judgment is not binding on this court.



The Evidence:

11. In support of the Plaintiff's case, PW1 testified by adopting her written statement dated March 2016 as her evidence. She produced as exhibits the documents in the list dated March 2016 and supplementary list dated 11th June 2024 as bundle Pexh 1 and 2 respectively. The witness statement reiterated what is pleaded in the plaint.
12. During cross examination the Plaintiff stated that she retired as a teacher in the year 2024 and had trained in Kigari Teachers' college between 1987-1989. That she finished her secondary education in 1984 and between the year 1985-1987 she was doing farming in the plot she was given by her parents.
13. She testified that she did ballot and attended the interview at Dandora following the call by the Nairobi City Commission for people from low income areas. She allocated a plot and paid Ksh.1,100 and was issued with a receipt although she has not filed it because she did not know it was required. She asserted that she built the houses on the suit property over time having started in the year 1988 with the help of her father to whom she would send money to. She admitted that she did not keep the receipts for purchasing the building materials because she knew the property was hers and also lost her possession to the suit property in 2013 after their father passed in 2012.
14. She said that during the lifetime of their father, he used to send her the rental income into her bank account since he lived in Nairobi. Following his demise in August 2012, the 2nd Defendant retained the plot card. That she reported at Dandora police station and at the County Officer where she was told she cannot be issued with another original card. She averred that even with the loss of the card, the City Council had here details on record which facilitated the issuance of title in her name.
15. DW1 testified in support of the Defendant's claim adopting his written statement dated 13th May 2024 as evidence in Chief.
16. He testified that the Plaintiff is their sister, as the children of the late Moses Musi Akola, who passed away on 1st August, 2012. That their father had two wives, with the Plaintiff belonging to the first house, while the Defendants are from the second house. It is his evidence that in the 1970s and 80s, they lived with their father who served as a Senior Children's Officer in Nairobi while the Plaintiff primarily resided in the village and only moved to Nairobi in 1984 to repeat her Form Four studies at St. Edward Secondary School.
17. He continued in evidence that at the time the suit plot was acquired, the Plaintiff was 17 years old and did not have any income. That due to his employment, their father was ineligible for the allotment, so he used the Plaintiff's name to secure the property with the intention that she would hold it in trust for the family. The Defendants asserted that the Suit Property has been developed and maintained by their late father, who built rental units on it in 1987 as evidenced by his personal diary entries and photographs confirming his involvement in the construction.
18. That after their father died in 2012, the Defendants have continuously managed the property, paid utility bills, and collected rental income, which has been used to support the family. According to the witness the Plaintiff never contributed financially towards the purchase or development of the Suit Property and has not been involved in its management.
19. That the issue of ownership was previously discussed in Eldoret HCP&A Cause No. 5 of 2013, but his brother and himself were not parties to those proceedings and also the court lacked jurisdiction to determine ownership. He urged the court to dismiss the case with costs.



Submissions.

20. The Plaintiff stated in her submissions dated 13.11.24 that she is the registered owner of the suit property and has instituted this suit seeking to protect her property rights. She stated that she lawfully developed the property by constructing rental units, from which she derives income. However, the Defendants have allegedly interfered with her ownership by assuming the role of landlords and are unlawfully collecting rent from the suit property.
21. She relies on documentary evidence, including a confirmation of ownership dated 19th October 19, 2015, a plot card, an allotment approval from January 8, 1986, and a certificate of lease dated 1st November, 2020. She argues that her registration as the proprietor under the [Land Registration Act](#) vests her with absolute ownership, which cannot be defeated except as provided by Section 25 of the [Land Registration Act](#).
22. She submitted that Article 40 of [the Constitution](#) and Sections 24 and 25 of the [Land Registration Act](#), protects her rights as the registered owner of the suit property and the sanctity of title. She supported this submission by citing the case of *Gathenya Ngumi v Eric Kotut & 4 others* (Environment & Land Case 164 of 2013) [2022] KEELC 1851.
23. The Defendants vide their submissions dated 24th January, 2025 stated that the Plaintiff holds the suit property in trust for the family and the estate of the late Moses Musi Akola. They assert that it is their late Moses Musi Akola, and only used the Plaintiff's name to acquire it. They relied on evidence, such as diary entries and photographs, indicating that their father bought the property and developed it by constructing rental units, with the family living there since 1987.
24. Placing reliance to Section 25 of the [Land Registration Act](#), 2012 which recognizes overriding interest on registered land including trusts, the Defendants argue that the Plaintiff holds the Suit Property in trust for the estate of Moses Musi Akola. In support, they cited the case of *Ngugi V Kamau & Another* (Environment & Land Case 36 Of 2020) [2022] Keelc 2261 (Klr) (23 June 2022) And *Julius Kimathi Mugwika V John Guantai Mugwika* [2020]Eklr.
25. They emphasize that their father had intended for the land to benefit the family, and they meet the legal criteria for establishing a trust. It is their assertion and contention that the Plaintiff has failed to provide sufficient evidence to prove that she bought the property or paid for its development.

Analysis and determination:

26. It is not disputed that the suit property is currently registered under the Plaintiff's name. The Defendants have also not denied that they are in possession and are receiving rent. The questions for determination are two:
 - a. Whether or not the Plaintiff is registered in trust for the beneficiaries of their father's estate, if no,
 - b. Whether the Defendants are illegally in possession and illegally collecting rent
 - c. Who bears the costs of the suit



27. The *Land Registration Act* is very clear on issues of ownership of land and Section 24 (a) thereof provides as follows:

“Subject to this Act, 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.”

28. However, the ownership can be challenged in the manner provided under Section 26 of the Act which states that:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

29. The Defendants contend that their father, the late Moses Musi Akola purchased the suit property but put in the name of the Plaintiff. Hence, the Plaintiff holds the property in trust of the family and in support of their argument cited the case of Julius Kimathi Mugwika V John Guantai Mugwika [2020] Eklr which quoted the case of Isack Kieba M’inanga versus Isaaya Theuri M’Lintari & another [2018] eKLR.

30. Section 107 of the *Evidence Act* provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. Section 108 is also to the effect that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side, while section 109 states that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

31. In that case of Isack Kieba M’inanga v Isaaya Theuri M’Lintari & another [2018] eKLR the Supreme Court of Kenya held 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.”

32. In the case of Susan Mumbi Waititu –VS-Mukuru Ndata & 4 others (19 of 2007) eKLR Justice M.S.A Makhandia stated that:-

“As for trust, the plaintiffs must prove with cogent evidence that the suit premises was ancestral land and thus family land. In the circumstances of this case, the plaintiffs have miserably failed in this onerous task. The 1st defendant has deponed that he purchased the suit premises for value. Accordingly, it is not family land passed over through the ages. I have no reason to cast doubts over this averment. The plaintiffs themselves have not in the supporting affidavit deponed to anything to suggest that the suit premises were actually ancestral land. Trust cannot be imputed. It must be proved. In the absence of such proof, I find and rule that there was no trust envisaged by the 1st defendant in favour of the plaintiffs”.

33. Following the two precedents, the first factor to establish customary trust as alleged by the Defendants, is whether they have presented evidence to support the allegation that the suit property is family property. The Defendants rely on the extracts of their late father’s diary and photographs of him on the suit property during construction to show that he is the one who developed the rentals.
34. The facts set out by the Plaintiff that the balloting for the suit property was done in 1984 is not disputed. What the Defendants believe is that the plot card was registered in the Plaintiff’s name at the time of balloting because their father who was a children’s officer could not qualify to get a plot meant for low-income residents of Nairobi. The extracts of the diary of the deceased produced are for entries for the year 1987 as per that diary and so they donot provide evidence that the deceased paid for the suit plot. The only mention are entries made in September and November of the said year.
35. Entry on 29th September 1987 has Mr Akola state that the house foundation set was approved and on 30th Sept excavation of the house to start. On 17th November 1987, the deceased said he bought two lorries of sand, on 19th He purchased 2-8 tonnes lorries of ballast and on 20th November, he laid the concrete foundation. During this period before construction, the Defendants do not state where they were living with their deceased father who was already working in Nairobi. He pleaded that they started living on the property from the 1990s until their father died in Nairobi.
36. Why was the residence prior to construction important? It would form a basis that indeed the suit plot was family property. In this instance, the father to the parties herein had alternative accommodation in Nairobi and therefore if he purchased the suit property as alleged, then it was a commercial property, nowonder more rental houses were built on it as evidenced by the rent receipts exhibited.
37. Also, we ought to look at the intention of the alleged purchaser. The Defendants state that their late father purchased the suit property but allegedly registered the same under the Plaintiff’s name because he was not eligible for the allocation. It is noteworthy that the suit property remained registered under the Plaintiff’s name until the year 2012 when late Moses Musi Akola passed on. Further, the development of the suit property was completed with the same still bearing the Plaintiff’s name.
38. If the purpose of the registration of the suit property into the plaintiff’s name was because the deceased was working, one wonders why he did not endeavour to effect the change during his lifetime from the Plaintiff’s name to his name. The allocation was done in 1984; the development began in 1987 (going



by the Defendants documents) and the death occurred in 2012 a quarter a century later. One can easily conclude that if it is the deceased who purchased the suit plot as averred then the intention was to gift it to the Plaintiff and not to have the Plaintiff hold it in trust for family.

39. Why do I reach the conclusion of absence of trust? The Plaintiff did produce as part of her documents a copy of a judgement in Eldoret HCC Probate & Administration Cause No 5 of 2013. In the said judgement, there is mentioned immovable properties that were registered in the name of the deceased such as Tiriki/Seremi/247, Kakamega/Mabusi/11 and Kakamega/Shirere/1582. The deceased having owned land on his own name an inference is drawn that he would have changed the title of the suit property to his name within the 25 years period if he wanted to. The Defendants have not in their evidence stated that he suffered any medical challenge. Therefore, I conclude that no basis for customary trust has been laid.
40. Besides, in the Probate and Administration Cause No. 5 of 2013, the suit plot was also claimed to form part of the estate Moses Musi Akola. The Defendants claim they were not party to that suit and so the judgement rendered therein does not affect them. However, a reading of paragraph 26(a) of that judgement appointed Rael Volekani Musi and Rachael Edagaye Akola as the joint administrators of the deceased. So that the Defendants not being administrators have no locus to pray for judgement as they do in the counter-claim for a declaratory order that the suit property belongs to the estate of the deceased Moses Musi Akola.
41. They did not bring any document in this case to show that the revocation of appointment of the persons named as administrators in the stated Cause No. 5 of 2013. Therefore, their counter-claim premised on rights accruing to the estate of Moses Musi Akola fails having been brought by persons not recognized in law.
42. In the same judgement which the Defendants said mention the suit property as peripheral issue, the matter in dispute was whether the suit property comprised part of the estate of the deceased. Kimondo J. holding that the same did not form part of the deceased estate stated as follows;
- “ 23. The commercial plot is registered in the name of the co-defendant. Although the plaintiff contends that the co-defendant was holding it in trust, there was no cogent evidence. The burden to prove the trust or to show the property belonged to the deceased fell squarely upon the plaintiff. See section 107 and 109 of the *Evidence Act*. See also *Evans Nyakwana v Cleophas Ongaro*, High Court, Homa Bay, Civil Appeal 7 of 2014 (2015) eKLR.
24. The property has never been in the names of the deceased. At paragraph 10 of the affidavit of the plaintiff sworn on 8th February, 2014 she states that;
- “ It is within my knowledge that the plot is part of the estate of the deceased since it is the deceased who acquired it but registered it in the names of Madrid Andia Akola to hold in trust for him and the family.”
25. I find that to be a bare statement; and, unadorned with any persuasive evidence. I think the plaintiff strongly believes the property belonged to the deceased. But in the absence of concrete evidence of a trust, I have no hesitation in finding that the property is not part of the estate of the deceased. The property remains that of the registered owner Madrid Andia Akola, the co-defendant.



43. The Defendants are part of the beneficiary of the said estate and have not told this court why they did not ask the Plaintiff that succession cause who is their mother to appeal the finding of the Eldoret high Court decision. Again, they submit that they cannot be bound by the impugned judgement but want to continue collecting rent on premises on the basis that the property forms part of their father's estate as pleaded in paragraph 7 and 22 of the amended statement of defence and counter-claim.
44. In light of the foregoing analysis, I find that the Defendants possession and dealings with the suit property constitutes acts of trespass, are illegal and without any justification in law. It is the Plaintiff who is entitled to quite possession as provided under section 25 of the *Land Registration Act*. Consequently, I dismiss the counter-claim and enter judgement for the plaintiff as follows:
- a. A declaration be is hereby issued that the Plaintiff is the absolute sole and legal proprietor of property known as Plot No. A4-670 Kayole situate within the County of Nairobi.
 - b. A permanent order of injunction is granted restraining the Defendants by themselves, their agents, servants and anyone claiming through them from trespassing, erecting structures and/ or in any other manner whatsoever dealing with the Plaintiff's property known as Plot No. A4-670 Kayole situate within the County of Nairobi.
 - c. The Defendants are directed to stop collecting rent from the suit premises forthwith. They are also directed to account of rental income collected from the suit property from the date of filing of this suit and a refund of the same to the Plaintiff.
 - d. Cost of this suit and interest at court rates from the date of judgement until payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2025.

A.OMOLLO

JUDGE

