



**Muga & another v Ogola & 4 others (Environment & Land Case  
E006 of 2022) [2024] KEELC 7137 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7137 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE E006 OF 2022  
AY KOROSS, J  
OCTOBER 31, 2024**

**BETWEEN**

**THOMAS OSCAR MUGA ..... 1<sup>ST</sup> PLAINTIFF**

**COLLINS BOB MUGA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JEREMIAH ODUOR OGOLA ..... 1<sup>ST</sup> DEFENDANT**

**ALFRED ODHIAMBO OGOLA ..... 2<sup>ND</sup> DEFENDANT**

**MARGARET APONDI OTOYO (SUED AS THE LEGAL REPRESENTATIVE OF  
THE ESTATE OF HESBORN OGOLA MUGA) ..... 3<sup>RD</sup> DEFENDANT**

**JACOB MUGA ..... 4<sup>TH</sup> DEFENDANT**

**SIAYA DISTRICT LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Background of the Case**

1. The plaintiffs and defendants are family members and draw their relations from 2 brothers Hesborn Owino Ogola (Hesborn) and Charles Evans Muga (Charles). The former was the older son of Jacob Muga (Jacob) and Sela Wando (Sela) and the latter was the last born. All these persons are deceased.
2. Hesborn was the husband of Margaret Apondi Otoyoy (Apondi) and is an administrator of his estate. Upon his demise, and under Luo customary law, Apondi got married to Charles. At the time of getting married to Charles, Charles was already married to Margaret Achieng Muga (Achieng).
3. The plaintiffs are children of Achieng and Charles's union. Whereas the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> defendants are Hesborn's children either with his union with the Apondi or his other wife Siprina Atieno (Siprina).



4. It is worth mentioning that Apondi and Charles sired 2 children however, these children are not parties to the proceedings.

### **Plaintiffs' cases and evidence**

5. In the further amended plaint dated 24/10/2023 filed by the law firm of M/s. Kakai Mugalo & Co. Advocates, the plaintiffs pleaded and particularised fraud and customary trust against the defendants over land parcel no. North Gem/Ndere 93 (suit property). It is registered in 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> defendants' names.
6. In the plaint, the plaintiffs sought the following reliefs from this court:-
  - a. A declaration the suit property is ancestral land and the plaintiffs were entitled to a share thereof.
  - b. A declaration the suit property is family and ancestral land for the plaintiffs' benefit and the trust be dissolved for the land to be shared between the plaintiffs and 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> defendants.
  - c. A declaration that Hesborn held the suit property in trust for the Muga clan.
  - d. The 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> defendants' registration over the suit property was unlawful, fraudulent, and malafides and transfers after Hesborn's demise were unlawful.
  - e. A declaration the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants fraudulently acquired the suit property.
  - f. A rectification of the suit property's register by cancellation of the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> defendants' registration.
  - g. An order for the suit property to be subdivided into 4 equal portions and 1/6<sup>th</sup> thereof be registered in the plaintiffs' name.
  - h. Permanent injunction against the defendants restraining them from interfering with the plaintiffs' possession and occupation of a portion of the suit property.
  - i. Costs of the suit.
7. The plaintiffs called a total of 4 witnesses who were the 1<sup>st</sup> plaintiff who testified as PW1, Jael Apondi Akoo (PW2), Edwina Akumu Onyango (PW3), and Achieng (PW4).
8. PW1 adopted his witness statement and produced several documents. He testified in 1966, Jacob and Sela registered the suit property in Hesborn's name and when he (plaintiff) was born, he found Charles's residence already on the suit property and that Jacob, Sela, and Charles were all buried in the suit property. He stated his house also stood on the suit property.
9. He contended Apondi and Charles were appointed administrators of Hesborn's estate in Nairobi HC Succession Cause No. 1322 of 1989 and a confirmed grant was issued on 6/11/1998, amended on 6/05/1999 and further amended on 3/10/2018.
10. He stated in the distribution of Hesborn's estate, 1/6<sup>th</sup> of the suit property was left unadministered hence it ought to belong to Charles.
11. He stated he discovered Apondi had transferred the suit property on 12/08/2016 without her replacing Charles as a co-administrator who had since died. According to him, this imputed fraud.
12. As to the date of discovery of the fraud, he testified this was after Apondi filed documents in Siaya PM Succession Cause no. 222 of 2016 which was on probate proceedings over Charles's estate.



13. He testified that even if the 1<sup>st</sup> defendant was eventually made a co-administrator of Hesborn's estate in place of Charles, the subsequent transfer of 7/08/2019 was also fraudulent. He stated he was aware Sela had other parcels of land and was unsure if land parcel no. North Gem/Ndere/716 (716) belonged to Charles.
14. PW2 who was Hesborn and Charles' step sister testified that she was present when Sela allocated portions of the suit property to Hesborn and Charles.
15. She averred that Sela allocated another parcel of land to Charles which was not far off from the suit property and it was ploughed by Achieng. She asserted that if indeed Hesborn's estate was succeeded, then she had no qualms with the distribution thereof.
16. PW3 testified she was not present when Sela distributed the suit property but Sela told her the last born (Charles) would remain on the suit property. She stated she was not privy to the probate proceedings on Hesborn's estate.
17. Achieng (PW4) got married to Charles in 1970. She testified the plaintiffs, herself, and Apondi had homes on the suit property. It was her testimony Sela's home still existed on the suit property and faced the gate meaning as per Luo customs, Sela was the owner of the homestead.
18. She testified when she got married, Sela was alive but died in 1978 and 716 was given to Charles because his portion in the suit property which he owned by virtue of being a last born, was small.
19. It was her testimony Sela divided the suit property in 1966 long before her marriage to Charles and she was not present when she did so. She stated she was privy to probate proceedings on Hezron's estate and according to her, in those proceedings, 1/6<sup>th</sup> was to go to Charles but did not know why it was not reflected in the distribution of Hesborn's estate.
20. She averred there was no fraud over the suit property as the green card reflected the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> defendants' registration was in tandem with the confirmed grant but took issue with the transactions of 12/08/2016.

#### **1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants' cases and evidence**

21. These defendants strenuously opposed the claim and by counsel, Mr. L.O. Magesa, filed an amended defence on 17/05/2023. It was mostly composed of denials. It also on without prejudice basis, made several averments.
22. Apondi testified as DW1 and relied on her witness statements and several documents to support their case.
23. It was her testimony the suit property was given to Hesborn by Sela. She asserted upon Hesborn's demise in 1986, she and Charles were appointed as the administrators of his estate and that there were no objections whatsoever during the probate process.
24. She stated upon Charles's demise, the grant was amended and the 1<sup>st</sup> defendant was appointed co-administrator in place of Charles. She thereafter proceeded to distribute the estate in terms of the further amended grant and registered the suit property in the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> defendants' names.
25. She testified that the transaction of 12/08/2016 was done after Charles's demise and before the appointment of the 1<sup>st</sup> defendant as co-administrator and denied allegations of fraud.



26. She testified when she got married to Hesborn in 1980, Sela was already dead and Sela, Siprina, Charles, and Hesborn were buried on the suit property. Further, Hesborn, Charles, the plaintiffs, and 1<sup>st</sup> defendant had homes on the suit property.
27. She stated that though Sela is registered in 716, this parcel belonged to Charles and the plaintiffs should relocate to that land.

#### **5<sup>th</sup> defendant's case and evidence**

28. By the office of the Attorney General, the 5<sup>th</sup> defendant filed a defence dated 22/01/2024 which denied the plaintiffs' claim and contended it was a stranger to the averments of trust.
29. Alex Mutua, a land registrar testified as DW3 and produced several documents in support of his case. He testified as a land registrar, he relied on documents as presented to him, and in 2016, he registered Apondi alone as the registered owner. In doing so, he relied on the amended grant of 6/05/1999.
30. He contended this entry was cancelled and a further amended grant was issued and duly registered by his office. According to him, due process was followed. He stated the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> defendants were registered as the suit property's owners as per the amended grant of 3/10/2018.

#### **Parties' submissions**

31. As directed by the court, all parties filed written submissions. The plaintiffs' submissions dated 26/03/2024 identified 4 issues for determination- whether the plaintiffs had locus standi; whether the suit property was ancestral land and held in trust for the Muga family and whether the transaction of 12/08/2016 was carried out fraudulently by Apondi.
32. The 1<sup>st</sup>-4<sup>th</sup> defendants' submissions were dated 28/04/2024 and identified a single issue for determination- whether the plaintiffs had locus standi.
33. Lastly, the 5<sup>th</sup> defendant filed written submissions dated 8/05/2024 and identified a singular issue for determination- whether the transfer of the suit property to Apondi and subsequently to the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> defendants was fraudulent.
34. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the respective parties' arguments on the particular issue and also consider provisions of law and authorities they relied upon to advance their arguments.

#### **Issues for determination**

35. I have considered the pleadings, evidence adduced by the parties, as well as counsels' rival submissions. Being guided by the provisions of law and judicial precedents that have been well cited, I shall now proceed to consider the merits or otherwise of the plaintiffs' claim and conceivably the issues for resolution are;
  - I. Whether the plaintiffs had locus standi.
  - II. Whether the suit against the 3<sup>rd</sup> defendant is competent and whether the adopted mediation agreement should be set aside.
  - III. Whether the plaintiffs' claim of customary trust over the suit property was proved.
  - IV. Whether the claim of fraud was statutorily barred and if not, whether fraud was specifically pleaded and proved.



V. What orders should this court issue including an order as to costs?

### Analysis and determination

36. The issues that were earlier identified as arising for determination shall be dealt with in a seriatim manner.

#### I. Whether the plaintiffs had locus standi

37. Section 2 of the *Civil Procedure Act* has defined a 'legal representative' as: -

“a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.”

38. Section 82 of the *Law of Succession Act* provides as follows: -

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- (b) .....

39. This court concurs with the decision of Kipngetch Kalya Kones (Suing as the Administrator of the estate of Kipkalya Kiprono Kones (deceased) v Wilson Kiplangat Kones [2021] KEELC 241 (KLR) which was relied on by the 1<sup>st</sup>- 4<sup>th</sup> defendants' counsel and it stated:-

“26. The issue on locus standi is a primary point of law almost similar to that of jurisdiction and since the Plaintiff/Respondent was not an administrator to the deceased's estate herein, he lacked the capacity to sue on behalf of the deceased's estate which renders the suit incompetent.”

40. The 1<sup>st</sup>- 4<sup>th</sup> defendants' submissions argue that since the plaintiffs had filed the suit as Charles's representatives, they could not file the current suit in their names but rather as administrators of Charles's estate. They further argue that in any case, Achieng was Charles's administrator.

41. The plaintiffs' submissions contend that the plaintiffs have filed suit in their names and at no time did they purport to represent Charles's estate instead they are pursuing their overriding personal interests over the suit property.

42. Upon closely examining the plaint, I agree with the plaintiffs that they never filed the suit in a representative capacity and were not required to disclose in what capacity they had filed the suit as required by Order 4 of the Civil Procedure Rules (CPR).

43. Their claim of pursuing alleged customary rights over the suit property shows they have sufficient interests over it and by Order 1 Rule 1 of the CPR, they could sustain claims in their names. It is my finding they had locus standi.



## II. Whether the suit against the 3<sup>rd</sup> defendant is competent and whether the adopted mediation agreement should be set aside

44. The legal instrument that grants personal representatives the capacity to administer estates of deceased persons is the letters of administration and as envisaged by Section 80 (2) of the *Law of Succession Act* (LSA), the date of effect takes place from the date of issuance of the grant.
45. Upon being capacitated by the grant and as provided by Section 82 (a) of the LSA, administrators can sue or be sued in causes of action which, by any law, survive the deceased or arising out of his death for his personal representative. See *Estate of Julius Mimano (Deceased)* [2019] KEHC 10103 (KLR). See *In re Estate of Julius Mimano (Deceased)* [2019] KEHC 10103 (KLR).
46. From documentary evidence, an amended grant dated 3/10/2018 was issued in Nairobi HC Succession Cause No. 1322 of 1989 appointing Apondi and 1<sup>st</sup> defendant as the administrators of Hesborn's estate.
47. Yet, the plaintiffs have only sued one administrator and left out the other. Is that legally tenable? The answer is in the negative. Section 79 of the LSA vested Hesborn's estate on the 1<sup>st</sup> defendant and Apondi.
48. The estate having been so vested by law, the 2 administrators had to be jointly sued. Having not been so sued, Apondi could not be singularly sued or even singularly sign the partial mediation settlement agreement dated 12/4/2024. This is so as she could not singularly bind the 1<sup>st</sup> defendant.
49. Thus, I find that Apondi lacked the capacity to be sued in the manner she was. On this, I am persuaded by the decision of *Republic v Nairobi City Council, Luziki Holdings Limited, Elizabeth Wanjira Evans & Mary Wanjiru Gachege Exparte Christine Wangari Gachege Suing on Behalf of the Estate of Rahab Wanjiru Evans* [2014] KEHC 7327 (KLR) which held:-
- “The capacity to agitate any suit on behalf of the estate of the deceased inheres in the administrators duly appointed by the court (See section 79 of the *Law of Succession Act* (Chapter 160 of the Laws of Kenya)). They act jointly at all times and in the event of a dispute among them, as is apparent in this case, the dispute must be resolved by the court that issued the grant of letters of administration. One administrator out of the others lacks the capacity to bind the estate or any of the administrators or file suit alone on behalf of the estate.”
50. It is also imperatively noted that Achieng and Apondi signed the mediation agreement to the exclusion of all the other parties to the suit. It follows the partial mediation agreement and its adoption by the court cannot be sustained.
51. Apart from Apondi lacking capacity, there is no evidence that Achieng was given written authority as required by Rule 17 of the Civil Procedure (Court-Annexed Mediation) Rules. I find that Achieng did not have the capacity to execute the mediation settlement agreement.
52. Rule 54 of the Civil Procedure (Court-Annexed Mediation) Rules gives this court unlimited jurisdiction on mediations whereas Rule 39(3)(e) thereof empowers this court to set aside an order or decree that emanated from a mediation settlement agreement and this provision states: -

“The following shall constitute the grounds upon which an application to set aside an order or decree arising from a mediation settlement agreement—



- a) .....
- (b) .....
- (c) .....
- (d) .....
- (e) where the settlement agreement is invalid under Kenyan or international law, or is or has become incapable of enforcement under Kenyan law.”

53. Accordingly, I set aside the orders issued on 12/6/2024 that adopted the partial mediation settlement agreement as a partial judgment of the court.

**III. Whether the plaintiffs’ claim of customary trust over the suit property was proved**

- 54. Except for the plaintiffs’ submissions which argued on constructive and customary trusts, none of the others submitted on this issue. From the pleadings and evidence, it is evident the claim is on customary trust.
- 55. Section 24 (a) of the *Land Registration Act* states the registration of a person as the proprietor of land shall vest in that person the absolute ownership together with all such rights and privileges thereto. Nonetheless, Section 28(b) expressly recognizes customary trusts as one of the overriding interests over land.
- 56. These rights are also compounded by Section 25 thereof which provides that a registered proprietor holds title to land subject to leases, charges, encumbrances, conditions, restrictions, liabilities, rights, and interests including overriding interests such as customary trusts that have been recognized by Section 28 (b) of the same Act.
- 57. By Section 107 to 109 of the *Evidence Act*, the persons claiming trust have the onus of proving it, and the court can never imply trust but give effect the intention of the parties to create such trust for the benefit of a group of other family members.
- 58. A party claiming customary trust must provide evidence to prove the existence of such a trust and once a positive determination is made, such a trust binds the registered proprietor. Because each case is unique, a case has to be determined on its own merits and the quality of the evidence presented before the court.
- 59. The Supreme Court of Kenya whose decision is binding upon this court settled the principles of customary trust in the case of *Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another* [2018] eKLR and on analysis of provisions of the Registered *Land Act* (Repealed), the current *Land Registration Act* and judicial precedents, the court held thus in paragraph 52 of its judgment: -

“...we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor...The categories of a customary trust are therefore not closed. ..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.” Emphasis added.

60. Now, turning to the evidence. It emerged the suit property was before the 1<sup>st</sup> registration, family land. At 1<sup>st</sup> registration which occurred on 11/05/1966, it was registered in Hesborn’s name.
61. This suit property is occupied by Hesborn’s and Charles’s families. In addition, family members including Jacob, Sela, Siprina, Hesborn, and Charles are all buried on this land.
62. But that was not the only family land, 716 was also registered on the very day as the suit property. Although it was and is still registered in Sela’s name, it has always been exclusively utilized by Charles and upon his demise, by Achieng. There is no dispute that despite its registration records, it belongs to Charles.
63. From the evidence, Hesborn was born in 1924 and Charles in 1946 meaning during the land consolidation or adjudication process which which crystallized into registration of the suit property in 1966, they were adults.
64. None of the witnesses testified that they were present during the registration process or familiar with it. Only PW2 testified she saw Sela allocating portions of the suit property to Hesborn and Charles.
65. PW2 did not elaborate on what circumstances or point in time in which Sela distributed the suit property. In any case, she was born in 1949 and it suffices that at the date of issuance of title, she was a minor.
66. Bearing in mind consolidation or adjudication is a public process and involves demarcating, surveying, and recording of land before its eventual registration and the process usually takes several years before eventual registration. The evidence of PW2 who was a minor at the date of registration of title, is not credible and unreliable.
67. The persons who were conversant with the adjudication process were Sela, Hesborn, and Charles and are all dead. It is remarkable that during their lifetime, the plaintiffs did not pursue legal action over the registration of the suit property and disputes only arose during probate proceedings of Charles’s estate.
68. Since dead men and women do not tell tales, Charles’ actions in Nairobi HC Succession Cause No. 1322 of 1989 will unravel the plaintiffs’ claim.
69. In this probate proceedings which was on Hesborn’s estate, Charles was a co-administrator together with Apondi. The suit property was distributed to Hesborn’s children who included his children with Siprina and Apondi. The administrators even left out children born from Apondi’s and Charles’s union.



70. Noteworthy, during these probate proceedings, Charles had a house in the suit property and at no time in these proceedings, did he even lodge any claims over the portion of the suit property that he occupied.
71. The significance of Charles's action demonstrates he was very clear in his mind that he did not have any interest whatsoever in the suit property and to him, it solely belonged to Hesborn. As a co-administrator, he enabled Hesborn's children to inherit the suit property.
72. Charles's conduct shows it was the intention of the brothers, at the time of registration, that each one of them would have distinct interests over their respective parcels of land- Hesborn the suit property and Charles 716.
73. Notwithstanding this court is not a probate court and lacks jurisdiction over such cases, it is observed from the further amended grant dated 18/09/2018, that the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> defendants are beneficiaries of the suit property and the net residue thereof was distributed to persons listed therein. Taking all the above into account, I find the plaintiffs' claim of customary trust fails.

### **III. Whether the claim of fraud was statutorily barred and if not, whether fraud was specifically pleaded and proved.**

74. None of the parties' submissions argued on this issue. Section 4 (2) of the *Limitation of Actions Act* provides that an action founded on tort cannot be brought after the expiry of 3 years from the date on which the cause of action accrued but by Section 26 of this Act, time does not begin to run for purposes of limitation until the plaintiff discovers the fraud.
75. Paragraph 12 of the further amended plaint shows the plaintiffs discovered the circumstances of the ownership of the suit property in April 2016 by stating as follows: -
 

“The plaintiffs only discovered in April 2016 that the title number to the ancestral land where the 1<sup>st</sup> plaintiff has built his home and his father was buried was North Gem/Ndere 93 and it was registered in the name of the late Hesborn Owino Ogola.”
76. As to the discovery of the alleged fraud, PW1 testified that he discovered it after Apondi filed pleadings in Siaya PM Succession Cause no. 222 of 2016. From adduced evidence, these pleadings were filed on 22/03/2017.
77. This suit was filed on 27/04/2022. As a result, it follows the claim was unquestionably filed outside the statutory period and I find the claim of fraud was time barred.
78. Before I pen off, I must mention the registration of 12/08/2016 has been overtaken by events. It was cancelled and registration was carried out as per the further amended confirmation of the grant. Even if the claim was not time barred which it is, I would have found the claim of fraud was not proved to the required standards.

### **V. What orders should this court issue including an order as to costs?**

79. It is my ultimate finding the plaintiffs did not prove their case to the required standards. It is trite law costs follow the event. The plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants are close relatives and to foster reconciliation, there shall be no orders as to costs. I hereby issue the following disposal orders: -
  - a. The plaintiffs' suit against the 3<sup>rd</sup> defendant is hereby struck out.
  - b. The plaintiffs' suit against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants is hereby dismissed.



c. There shall be no orders as to costs.

It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 31<sup>ST</sup> DAY OF OCTOBER 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

**31/10/2024**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Miss Muchocho h/b for Mr. Mugalo for the plaintiffs

Mr. Magesa for 1<sup>st</sup> – 4<sup>th</sup> defendants

N/A for 5<sup>th</sup> Defendant

Court assistant: Maureen Achieng

