



**Alusiola & another v Musindai & another (Sued as the Legal Representatives of the Estate of the Late Joseph Manyonyi Musindai) (Environment & Land Case 117 of 2019) [2024] KEELC 13876 (KLR) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13876 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 117 OF 2019  
DO OHUNGO, J  
DECEMBER 16, 2024**

**BETWEEN**

**GEORGE SHIVACHI ALUSIOLA ..... 1<sup>ST</sup> APPLICANT**

**EVANS MIHESO ALUSIOLA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**FLORENCE ATOLWA MUSINDAI ..... 1<sup>ST</sup> RESPONDENT**

**WILFRIDAH AMUDWAYI SHIVACHI ..... 2<sup>ND</sup> RESPONDENT**

**SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE JOSEPH MANYONYI MUSINDAI**

**JUDGMENT**

1. The Applicants moved the Court through Originating Summons (OS) dated 14<sup>th</sup> October 2019 where they averred that they were jointly entitled to 2.1 hectares of the parcel of land known as Kakamega/Savane/322 (the suit property) through customary trust and/or adverse possession.
2. The Applicants therefore sought determination of the following:
  1. If the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are the legal representatives of the estate of the late Joseph Manyonyi Musindai;
  2. If the late Joseph Manyonyi Musindai alongside his brother the late Shem Alusiola Musindai became the jointly registered proprietors of Plot 322 through transmission vis-a-vis succession proceedings over the estate of their late brother Johana Meso Musindali who pre-deceased them;



3. If Plot 322 is a parcel of land which ha (sic) devolved from one generation to the next within the family of the deceased brothers;
  4. If upon the demise of Shem Alusiola Musindai his brother Joseph Manyonyi Musindai remained the sole owner of Plot 322;
  5. If however, the ownership of 2.1 Ha vide Plot 322 by the estate of the late Joseph Manyonyi Musindai as referred to supra, is subject to a Customary Trust in favour of the Applicants;
  6. If additionally, the Applicants have been in possession and occupation of the said 2.1 Ha for a period in excess of 12 years in an open, peaceful and uninterrupted manner;
  7. If such possession and occupation of the said 2.1 Ha has been adverse to the proprietary interests of the estate of the late Joseph Manyonyi Musindai;
  8. When did time necessary to constitute adverse possession in favour of the Applicants begin to run;
  9. If having been in possession and occupation of the said 2.1 Ha in an open, peaceful and uninterrupted manner for a period in excess of 12 years, whether the Applicants have acquired ownership of the same through prescription;
  10. If the proprietorship of the late Joseph Manyonyi Musindai with respect to the 2.1 Ha is subject to the prescriptive rights of the Applicants;
3. The OS was supported by an affidavit sworn by the First Applicant on 14<sup>th</sup> October 2019. The Respondents opposed it through their joint Replying Affidavit wherein they deposed that Shem Alusiola Musindai acquired title to the suit property through fraud. They prayed for an order that Shem Alusiola Musindai be expunged from land registration records in respect of the suit property and that a new title be issued in the name of Joseph Manyonyi Musidayi.
  4. Hearing of the OS proceeded by way of oral evidence. The First Applicant testified as PW1 and adopted his aforesaid supporting affidavit as his testimony. He also produced copies of annexures “GSA 1” to GSA6” in the said affidavit as his exhibits. He stated that the Respondents were not registered proprietors of the suit property as of the date of his testimony and that instead, Joseph Manyonyi Musindai and Shem Alusiola Musindai, both deceased, were the registered proprietors.
  5. PW1 further testified that the Applicants filed this case in their personal capacities without obtaining any letters of administration. That as of the date of his testimony, neither he nor the Second Applicant had any home on the suit property. Instead, they had resided on Kakamega/Savane/321 all their lives. He added that there was no one residing on the suit property and that they were not claiming whole of it but only half of it.
  6. Miheso Lawrence Musindayi Manyonyi (PW2) adopted his witness statement dated 14<sup>th</sup> October 2019 as his testimony. He sated therein that Joseph Manyonyi Musindai (deceased) was his father and a brother to Shem Alusiola Musindai (deceased) and Johana Meso Musindali (deceased). That the Applicants are sons of Shem and his cousins while the First Respondent is the widow of his late brother Simon, and the Second Respondent is the daughter of his late brother Clement.
  7. PW2 further stated that he lived with Johana in the 1970s and that after Johana’s death he utilized the whole of the suit property until the family decided at a meeting that the suit property be shared equally between Shem and Joseph with each getting 2.1 hectares. That Simon and Clement took up Joseph’s 2.1 hectares while Shem took the balance and that with time, Shem and Joseph instituted succession



proceedings resulting in them being joint proprietors. He added that that Shem's and Joseph's families had co-existed peacefully over the years and that he was surprised to learn that some members of Joseph's family want to take Shem's 2.1 hectares which belongs to the Applicants.

8. Lastly, Elly Simwa Mbutsi (PW3) adopted his witness statement dated 14<sup>th</sup> October 2019 as his testimony. He stated that Joseph Manyoni Musindai and Shem Alusiola Musindai (deceased) were his older cousins and that he was aware that following the demise of Johana, Joseph and Shem equally shared the suit property which was Johana's land. That Joseph and Shem formalized the process through succession proceedings which resulted in them registered as proprietors. That following Shem's death in the year 2000, Joseph invited family members and neighbours in the year 2004 to witness handing over of Shem's 2.1 hectares to the Applicants who are Shem's sons after which a physical boundary was erected. He added that since Johana passed away on 12<sup>th</sup> December 1976, his brothers Shem and Joseph were each using 2.1 hectares of the suit property and that after their death, members of their respective families took over their respective portions.
9. The Applicants' case was then closed.
10. The First Respondent testified as DW1 Florence Atolwa Musindai and stated that she was born in 1949. That she was in occupation of the suit property to the exclusion of the Applicants as of the date of her testimony. She adopted her witness statement dated 31<sup>st</sup> January 2023 as her testimony and produced copies of the documents listed as item numbers 1 to 6 in the Respondents' List of Documents dated 31<sup>st</sup> January 2023, as Respondents' exhibits. She stated that she was not the registered proprietor of the suit property and added that the Applicants were her brothers in law and that both Respondents herein were administrators of the estate of Joseph Musindai. That Johana and Shem were brothers to Joseph and that their father Musindai gave each of the three sons his own parcel. She also stated that succession proceedings were yet to be conducted in respect of the suit property.
11. Wilfridah Amudwayi Shivachi (DW2) stated that she was the Assistant Chief of Shiveye Sub-location. She adopted her witness statement dated 31<sup>st</sup> January 2023 and added that the Applicants did not reside in the suit property but were residing in Kakamega/Savane/321.
12. Lastly, Rebecca Oloo Owuor Oloo (DW3) testified that she was a Cartographer working with Ministry of Lands since January 2023 and that she previously served as a Surveyor II. She added that she knew the locations of the suit property and Kakamega/Savane/321 and that the Applicants were in occupation of Kakamega/Savane/321 while the Respondents occupied the suit property. That she visited the site together with her team, the area chief and the First Applicant following a written request by a law firm. She also stated that the said visit was her fourth visit to the site.
13. The Respondents' case was then closed, after which parties filed and exchanged written submissions. The Applicants filed submissions dated 29<sup>th</sup> February 2024 while the Respondents filed submissions dated 26<sup>th</sup> February 2024.
14. I have considered the pleadings, evidence and submissions. The issues that arise for determination are whether adverse possession has been established, whether customary trust has been established, whether fraud has been established, and whether the reliefs sought are available.
15. The law relating to adverse possession was discussed by the Court of Appeal in the case of Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR where the Court 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.

16. A perusal of the register of the suit property shows that Joseph Manyoyi Musindayi and Shem Alusiola Musindai are the joint registered proprietors, having been so on 17<sup>th</sup> April 1996. There is no dispute that both are since deceased and that the suit property has not been subjected to succession proceedings. The register shows that the suit property measures 4.2 hectares.
17. The Applicants conceded that they have never been in occupation of the suit property. Possession is a key requirement of adverse possession. Further, there is no dispute that the parties are close relatives. The Applicants are the First Respondent's brothers in law and the Second Respondent's uncles. The Respondents are widow and daughter, respectively, of Joseph Musindai's sons. The Applicants' claim to the suit property, in their own words, traces its roots to the fact of their father Shem and Joseph having inherited it from Johana.
18. Quite apart from lack of proof of possession, there is another reason adverse possession is unavailable to the Applicants: the close family relationship with the Respondents.
19. The Court of Appeal had occasion to consider whether adverse possession could apply within families against close relatives in the case of *Samuel Kihamba v Mary Mbaisi* [2015] eKLR. 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.

20. In view of the foregoing, I find that adverse possession has not been established.
21. The next issue for determination is whether customary trust has been established. Trust is a question of fact which must be established through evidence. The key considerations are the nature of the holding of the land and intention of the parties. In *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR, the Supreme Court stated 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.
22. It is a requirement that a claim for customary trust be directed against the registered proprietor of the subject parcel. The Respondents herein are not the registered proprietors of the suit property. Although the Applicants contend that the proprietorship was a joint tenancy, I have perused the register of the suit property, and I see nothing therein to support the Applicants' claim.
23. Joseph Musindayi and Shem Musindai were registered as proprietor pursuant to the Registered Land Act (repealed). Section 101 (1) (a) of the said statute required that an instrument made in favour of two or more persons and the registration giving effect thereto show whether those persons were joint proprietors or proprietors in common. In the absence of any express indication in the register, there is no basis upon which to conclude that it was a case of joint tenancy. On the contrary, in view of the provisions of Section 91 (2) of the Land Registration Act, there is a presumption that they hold the interest as tenants in common in equal shares.
24. The estate of Shem Alusiola Musindai remains a registered proprietor of the suit property, alongside the estate of Joseph Manyonyi Musindayi. In those circumstances, there is no basis upon which the Applicants, who represent the estate of Shem Alusiola Musindai, can claim that the estate of Joseph Manyonyi Musindayi is holding is the suit property for their benefit through a customary trust, yet their interest is accounted for through registration. I find that customary trust has not been established. Parties should approach the succession court for administration and distribution of the suit property.
25. In their counterclaim, the Respondents contended that Shem Alusiola Musindai acquired title to the suit property through fraud. It is on that basis that they sought cancellation of Shem's proprietorship and issuance of a new title be in the name of Joseph Manyonyi Musindayi.
26. Courts have persistently emphasised that fraud is a serious allegation. The party alleging it is required to plead it, particularise it, and strictly prove it to standard higher than proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. There are many decisions to that effect. Suffice it to cite *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. The party alleging fraud has to connect the allegations and the facts in a way that reveals actual fraud. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR. Beyond alleging fraud, the Respondents did not prove it to the required standard.
27. In view of the foregoing discourse, I find that the Applicants have not proven their case to the required standard. Their case is without merit, and I therefore dismiss it. The counterclaim is equally unproven and is dismissed. In view of the family relationship between the parties, I make no orders as to costs.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 16<sup>TH</sup> DAY OF DECEMBER 2024.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Ms Ikhumba for the Applicants

No appearance for the Respondents



Court Assistant: M Nguyayi

