



**M’Nkanata v Kirima (Being sued as the legal representative of Riria Mboroki – Deceased)
(Environment & Land Case 61 of 2019) [2023] KEELC 19289 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 19289 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 61 OF 2019**

CK NZILI, J

MARCH 15, 2023

BETWEEN

PETER KIRUKI M’NKANATA PLAINTIFF

AND

**SABELA NCEKEI KIRIMA (BEING SUED AS THE LEGAL REPRESENTATIVE
OF RIRIA MBOROKI – DECEASED) DEFENDANT**

JUDGMENT

1. Through an originating summons dated November 12, 2019, the plaintiff seeks to be declared the owner of 0.29 ha of land out of the defendant’s LR No. Ntima/Ntakira/763 (hereinafter the suit land) by virtue of adverse possession. The originating summons is supported by an affidavit sworn on November 12, 2019 by Peter Kiruki M’Nkanata attaching copies of the register, photographs showing occupation, cherry collection slips and farm inputs invoices, all contained in the paginated bundle filed on December 9, 2021.
2. The defendant opposed the suit through both a replying affidavit and a notice of preliminary objection dated November 26, 2019. The defendant averred that the plaintiff’s advocates on record was also their lawyer in Meru Chief Magistrates Succession Cause No. 423 of 2004 for the estate of Gerald M’Mbogori who came across confidential information over the suit land. The defendant averred that the plaintiff’s deceased father was a brother of her deceased father and had forcefully entered into part of the suit land despite demands that he vacates it.
3. It was averred that the genesis of the matter began when the plaintiff’s deceased father sued his late brother in Meru HCCC No. 184 of 1988, seeking for a share of the suit land, which suit was heard and determined on 15.6.1989, giving him a half share of the land. The defendant averred that her late father unsuccessfully appealed against the decision in Nyeri Court of Appeal, Civil Appeal No. 17 of 1989.



4. That following her father's death on December 11, 1994, the defendant averred that she obtained a limited grant for the estate on September 17, 2003 and later on 27.1.2004 acquired a confirmed grant. That on October 13, 2003 the plaintiff applied for substitution in Meru HCCC No. 184 of 1988 while on February 3, 2004, the defendant was also appointed as his late father's legal representative in the said suit, following which she sought for an injunction against the plaintiff and a declaration that the judgment dated June 16, 1998 was spent and unenforceable, whose rulings were read in her favor on June 16, 1989 and June 30, 2004 respectively. The defendant averred that the plaintiff after failing to execute in Meru HCC 184 of 1988, he filed a Meru CMC Succession Cause No. 22 of 2016 but withdrew it on June 9, 2018, since the estate of her deceased father had fully been distributed in Meru CMCC Succession No. 423 of 2004. It was averred that thereafter the plaintiff applied for a revocation of the grant which application was dismissed by a ruling dated November 4, 2019.
5. Given the foregoing, the defendant further averred that the plaintiff has been occupying a portion of the land illegally since there were existing injunctive orders dated June 30, 2004, which were never set aside, discharged or appealed against which cannot be overridden by a new suit based on adverse possession. She termed this suit as res judicata, based on forceful and illegal occupation when the court is functus officio. She sought for the interim orders of injunction issued on November 13, 2019 to be discharged as they override the orders issued in Meru HCCC No. 184 of 1998. The defendant relied on a list of witness statements and documents dated November 11, 2021, all contained in a paginated bundle filed on November 26, 2021.
6. This court heard the interlocutory application dated January 12, 2019 together with the preliminary objection dated November 26, 2019. It dismissed the preliminary objection and issued a temporary injunction stopping the defendant from interfering with the plaintiff's use and occupation of the suit land pending the hearing and determination of this suit.
7. At the trial, the plaintiff adopted his affidavit in support of the originating summons and a witness statement dated November 16, 2021 as his evidence-in-chief. He stated that he has been in occupation of the suit land, which has distinct boundaries since 1962 after his father gave it to him. He planted coffee plants which he has been harvesting and selling over all those years. He produced a copy of the register as P. Exh No. (1), copies of photographs as P. Exh No. (2) and the cherry collection/farm input invoices receipts as P. Exh No. (3).
8. David Reche Kirima testified as PW 2. He adopted his witness statement dated November 16, 2021. His testimony was that the plaintiff was the occupant of the suit land undertaking various farming activities for the last 40 years. According to him, the suit land is divided into two portions, one under the occupation of the plaintiff while the rest was under the use of the defendant's children. He confirmed that following the death of the plaintiff's late father, disputes and or quarrels erupted but the police were able to suppress them though this did not stop the plaintiff from continuing to occupy his portion of the land.
9. Judith Kendi Mwirigi testified as DW 1. She adopted her witness statement dated November 11, 2021 as her evidence in chief. Her testimony was that she inherited the suit land from her late father-in-law through her husband. DW 1 testified that the coffee trees on the suit land belonged to her. She termed the plaintiff as a trespasser to the land from the time her late father-in-law was alive committing acts of wastage on the land. Further, she denied that it was the plaintiff who had been harvesting and or delivering cherries to the factory, since she was the one doing so, though she had no evidence to that effect. DW 1 produced a rectified certificate of a grant of letters of administration dated June 30, 2004 as D. Exh No. (1), ruling dated June 30, 2004 as D. Exh No. (2), an application for the letters of grant in Meru Chief Magistrate Succession No. 22 of 2016 as D. Exh No. (3), an affidavit in support as D.



- Exh No. (4), annexures thereto as D. Exh No's 5-10, a copy of the ruling dated 4.11.2019 as D. Exh No. (11), a letter dated October 24, 2004 as D. Exh No. (12), a letter dated April 11, 2015 as D. Exh No. (13), a police OB report Ref No. 42/24/10/2019 as D. Exh No. (14), a bundle of photographs as D. Exh No.15 (a) & (b) and lastly, an affidavit of Sabela Nchekei, the defendant said to be unwell as D. Exh No. (16).
10. George Muriuki Rwito testified as DW 2. As the area assistant chief of Mugambone Sub-location, his testimony as contained in his witness statement dated November 11, 2021. He testified that he had ordered the plaintiff to stop cutting grass on the suit land. He denied that it was the plaintiff who had been cultivating the suit land over the years. Similarly, DW 2 clarified that none of the warring parties were residing on the suit land.
 11. At the close of the defence, parties were directed to file written submissions by February 18, 2023. It was only the plaintiff who complied by filing written submission dated February 12, 2023. It was the plaintiff's submissions that his testimony had sufficiently established the ingredients of adverse possession going by the caselaw of *Maweu vs Lin Ranching Farming Coop Society* (1985) eKLR, *Gachuma Gacheru vs Maina Kabuchwa* (2016) eKLR, *Gabriel Mbui vs Mukindia Marangu* (1993) eKLR, *Mombasa Teachers Coop Savings and Credit Ltd vs Robert Mohamed Katana & 15 others* (2018) eKLR, *Mtana Lewa vs Kabindi Ngala Mwangandi* (2015) eKLR, *Stephen Mwangi Gatunge vs Edwin Onesmus Wanjau (suing in her capacity as the Administrator of the estate of Kimmingi Wariera (Deceased) and of Mwangi Kimmingi (Deceased))* (2022) eKLR, *Mate Gitabi vs Jane Kaburu Muga* (2017) eKLR.
 12. The court has gone through the pleadings the evidence tendered and written submissions. The issues calling for court's determination are:
 - i. If the suit is res-judicata and the court functus officio.
 - ii. If the plaintiff has proved the ingredients of adverse possession.
 - iii. If the plaintiff is entitled to the reliefs sought.
 - iv. What is the order as to costs?
 13. Section 7 of the *Civil Procedure Act* provides that no court shall try any suit or issue in which the matter directly and substantially was in a former suit between the same parties, litigating under the same title, was heard and finally decided by a court. In the case of *IEBC vs Maina Kaiyai & 5 others* (2017) eKLR, the court held that for a bar of res-judicata to be effectively raised and upheld, the following elements must be satisfied in conjunctive terms:
 - a. The suit or issue was directly and substantially in issue in the former suit.
 - b. That former suit was between the same parties or parties under whom they or any of them claim.
 - c. Those parties were litigating under the same title.
 - d. The issue was heard and finally determined in the former suit.
 - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
 14. In the case of *John Florence Maritime Service Ltd & another vs Cabinet Secretary for Transport and Infrastructure & 3 others* (2015) eKLR, the court held that the rationale behind res-judicata is on public interest that there should be an end to litigation to protect a party from facing repetitive



- litigation over the same matter. Further, the court said that since courts were already clogged or overwhelmed, the doctrine of res-judicata promotes the stability of a judgment by reducing the possibility of inconsistency, it promotes confidence and predictability of courts, which concepts are key pillars in the maintenance of and the respect for justice and the rule of law.
15. In this suit, the defendant averred and testified that the issues and the dispute before the court were before in Meru HCCC No. 184 of 1988, whose decree was declared unenforceable by a ruling delivered on June 30, 2004. Further, the defendant pleaded and testified that the subject land was distributed through a confirmed grant following an unsuccessful objection by the plaintiff. In support of these assertions, the defendant produced a rectified confirmed grant as D. Exh No. (1), a ruling in Meru HCCC No. 184 of 1988 as D. Exh No. (2), proceedings in Meru HCCC Succession case no. 22 of 2016 as D. Exh Nos. (3), 11 among them a ruling in Meru H.C Succession Case No. 423 of 2004 dated 4.11.2019 in which the court declined to revoke the grant.
 16. D. Exh No. 2 was a suit between the party's late father on the suit land based on an alleged trust. In a judgment dated June 15, 1989, the court ordered that the plaintiff's late father was entitled to half of the suit land. The defendant's father appealed against the said judgment in Nyeri Court of Appeal, Civil Appeal No. 17 of 1989 but the appeal was dismissed. The defendant further testified that the court found the decree unenforceable when both parties herein replaced their respective deceased parents, hence the plaintiff's claim is an abuse of the court process based on illegal occupation. On the other hand, the plaintiff pleaded and testified that he was a holder of letters of administration for the estate of his late father and so was the same with the defendant.
 17. From the case-law cited, though the former suit involved the parents of the parties in this suit, nowhere in the said previous judgment did the former court deal with and or determine an issue of adverse possession. In *Jediel M'Gaiti Kibera & another vs Mary Mugure & another* (2020) eKLR, at issue was a party seeking for the suit land by way of adverse possession, without disclosing the previous long and winding litigation on the same matter heard on merits based on both trust and adverse possession. The court upheld a preliminary objection since the applicants had had the opportunity to present their claim in the previous suit where the issue of adverse possession was present. The court cited with approval *Henderson vs Henderson* (1843 – 60) All ER 378, that a party has to forward its whole case and the court could not permit the applicants to open the same subject of litigation on a matter which might have been brought forward as part of the subject in the contest.
 18. In this suit, the pleadings in the former suit have not been produced as exhibits before this court. Be that as it may, the plaintiff's late father was confirmed as entitled to a half share of the suit land on account of trust. The plaintiff averred and testified that given those decreed rights, he took vacant possession of the suit land as a true owner, which fact the defendant knew about and has never sought to evict him from the land which he has for over 12 years developed as his and continued to derive farm income from.
 19. The defendant on the other hand termed the occupation as forceful, illegal and based on a decree which was declared stale or unenforceable by a competent court. Furthermore, the defendant averred and testified that the suit land was distributed and transmitted to her on account of a competent confirmed letter of grant as forming part of the estate of his deceased father.
 20. In the case of *Pop in (K) Ltd and 3 others vs Habib Bank A.G Zurich* (2016) eKLR, the appellants had filed an appeal against a ruling whereby the court had ordered that the suit was barred by the doctrine of estoppel on the extent of aspect of res judicata, as a result of which the court had held the suit bad. The argument was that the said could not be res-judicata since one of the parties was not a party in the former suits. The court dismissed the appeal holding that they could not see why the 1st appellant was not joined in the earlier two suits.



21. In this suit, the plaintiff has sued in his individual capacity on account of adverse possession. He was not a party to the previous suit until he took over at the execution stage after the initial parties passed on. At the time he was merely trying to enforce a decree as a trustee for the estate of his late father. He never raised a claim based on adverse possession which was determined in that suit. My finding, therefore, is that an adverse possession claim is properly before this court.
22. To find a claim on adverse possession, the law requires two concepts to be established namely; possession and discontinuance of possession of the true owner, continuously, peacefully, exclusively or uninterrupted, in the full knowledge of the true owner and with an intention to own the land. This was the holding in *Maweu vs Lin* (*supra*), *Mbui vs Maranya* (*supra*) *Stephen Mwangi vs Edwin Wanjau* (*supra*), and *Mate Gitabi vs Jane Kabubu Muga* (*supra*).
23. Further in *Mbui vs Maranya* (*supra*) the court held that the adverse character of possession must be established as a fact showing that there was a clear intention to hold adversely and under a claim of right. The court said that there must be defacto use and defacto occupation. As to what amounts to interruption, the court in *Gitbu vs Ndeete* (1984) KLR 776, held that assertion of a right occurs when the owner takes legal proceedings or makes an effective entry into the land. Concerning the identity of the land in possession, the court in *Wilson Kazungu Katana & 101 others vs Salim Abdalla Bakshwein & another* (2015) eKLR, observed that the identification of the land held by the adverse possessor is an important and an integral part of the process of proving adverse possession including the portion, the size and its exact location. As to the knowledge of adverse possession by the true owner, the court in *Mate Gitabi* (*supra*), held that efforts to report the trespass to the local administration showed that the respondent had notice of the appellant's occupation that was inconsistent and adverse to his title, but which reports were not sufficient to oust the appellants from the land and could not amount to interruption or truncate his adverse possession claims.
24. Applying the foregoing case law and principles to the facts and evidence herein, can the plaintiff be said to have established on a balance of probabilities, that he is entitled to the suit land by prescription?
25. The plaintiff pleads that the suit land under his occupation is 0.29 ha out of L.R No. Ntima/Ntakira/763. He averred that he has made immense developments therein and has been in actual and constructive occupation as per photographs, the cherry collection slips and invoices for receiving farm inputs from the factory. On the other hand, the defendant through her replying affidavit sworn on November 26, 2019 and produced as D. Exh No. 16 admitted that she was a cousin to the plaintiff. In paragraph 8 thereof she admitted that the plaintiff was in occupation of the land which she termed as forceful; illegal and contrary to her demand for vacant possession. She also admitted that the plaintiff's late father was declared as entitled to a half share of her land title number Ntima/Ntakira/763, vide a judgment dated June 15, 1988. The decree therein decree, was unsuccessfully appealed against by her late father. Additionally, the defendant admitted that efforts were made by the plaintiff to execute against her over the decree which however turned out to be unsuccessful since the decree was time-barred hence the reason she had sought an injunction on June 30, 2004.
26. Looking at the ruling alluded to, the court did not issue an injunction sought by the defendant but only issued an order of *status quo* to be maintained which orders have not been appealed against, set aside or vacated.
27. Similarly, in the pleadings and evidence tendered herein, what is clear is that a decree dated June 16, 1989 binding L.R No. Ntima/Ntakira/763 to the extent of 0.752 ha was in existence at the time the defendant's deceased father passed on and the rectified confirmation of grant was issued on 16.7.2012. Section 20 of the *Limitation of Actions Act* (Cap 22) provides that none of the period of limitation



prescribed under the Act applies to an action by a beneficiary under a trust or an account of trust property or breach of trust.

28. In *Kambora Kamau vs Esther Nyambura Kirima* (2002) eKLR, the court held that a certificate of confirmation of grant confers upon a beneficiary under it a beneficial interest in the estate of the deceased person. In the case of *Stephens and 6 others vs Stephen and another* (1987) eKLR, the court held that a defaulting fiduciary in possession of trust property or which he uses should not be shielded by time bar since no plea of limitation was available to a fiduciary under Section 20 (1) (b) of Cap (22). See *Irungu Kibe vs John Maina Kibe* (2019) eKLR. See *Samson M. Mumiira vs Jackson Kibeteru & another* (2007) eKLR.
29. In the case of *Macharia Kibari vs Ngigi Kibari* (1994) eKLR, the court held that limitation did not apply to customary law since land is held in trust even for decades before any step is contemplated for formal transfer. In the case of *Patel vs Transworld Safaris Ltd* (Civil Appeal) 288 of 2018) (2022) KECA 871 (KLB) April 28, 2022 Judgment, at issue was an enforcement of an arbitral award said to be time-barred under Section 4 (1) (a) of Cap 22. The court affirmed the finding of the court that execution begins after the issuance of the decree by the court which has to be done before 12 years have expired from the date of the decree.
30. In *Muthiora vs Marion Muthama Kiara* (2022) KECA 28th (KLR) (February 4, 2022) Judgment, the court held that trespass consists of a series of acts done on consecutive days and as per Section 3 of the *Trespass Act*, an unauthorized entry whether present or continuous could not be time-barred. In the case of *Andrew Robi Wambura vs Mogesi Marwa alias Itaroro & another* (2013) eKLR, the court had been asked to enlarge time to execute a decree issued on August 17, 1998, Kisii HCCC No. 82 of 1996 declaring a trust. Okongo J held that the court had no jurisdiction to extend time. Further, the court said that since the applicant had been in occupation of the and before the issuance of the decree and since there was no threat of eviction, the failure to execute the decree did not take away the declaration of a trust that had been made in his favour against the respondents.
31. In this suit, the decree in the previous suit was made on June 15, 1989. The appeal by the defendant was dismissed on October 1992. The decree became time barred as urged by the defendant as of June 10, 2003. The plaintiff obtained letters of administration for the decree-holder on January 21, 2004 while the defendant obtained hers on February 3, 2004. So, after the decree expired, the defendant did not apply for eviction orders against the plaintiff even though she knew that he was on the land. The time for adverse possession could only start running in favour of the plaintiff with effect from June 10, 2003 when the rights of his deceased father as to the execution of the decree became time-barred.
32. As at the filing of the suit in 2019 and the issuance of a temporary injunction on November 14, 2019, the twelve years as the minimum for adverse possession had accrued to the plaintiff. The ruling was delivered on 30.6.2004 by Hon. L. Justice Sitati as she then did not overturn the declaration of trust. It merely found the decree time-barred on account of the execution. The judgment was founded on customary trust which is not defeated by limitation under Section 20 of Cap 22. Similarly, the grant of the orders of *status quo* did not stop time from running in favor of the plaintiff. There was also an admission that a caution had been placed on the suit land and an attempt to use land surveyors to subdivide the land by the plaintiff.
33. So, then the *status quo* which the court maintained and was perhaps in force when this suit was filed related to entries No. 5, 3, 4, 5 & 6 in the copy of the records. Therefore, the change of ownership in favour of the defendant did not extinguish the adverse rights of the plaintiff which had accrued by 2015. The defendant all along knew that the plaintiff was on the suit premises not as a licensee but with the intention to possess and more particularly so, given that his late father had been declared entitled



- to a half share of the suit land by a court of competent jurisdiction. The plaintiff stayed on the suit land with the intention to not only possess but also to own to the exclusion of the defendant. The plaintiff has demonstrated his acts of ownership through various developments including receipts and invoices of farm produce. The defendant admitted the occupation though terming it illegal.
34. In his originating summons, the plaintiff averred that he had been in possession of the suit land in excess of 12 years. By the time he obtained a temporary injunction dated November 14, 2019, the plaintiff was already in occupation of what he termed as 0.58 ha of the suit land. This was confirmed by photographs dated 18.11.2019 showing various developments on the land. These in my view amount to hostile acts. In the Meru H.C Succession 423 of 2004, the plaintiff was also seeking for the revocation of the grant on account of a claim of ownership in which the probate court correctly stated that disputes relating to ownership of land or trust fell under the mandate of the ELC court. Similarly, in Meru HCC No. 184 of 1988, the plaintiff had filed a replying affidavit against the defendant's application seeking for a temporary injunction. He had also opposed the lifting of a caution and inhibition orders against the title. The court in its ruling dated 30.6.2004 granted an order of maintenance of *status quo* and not a temporary injunction stopping the plaintiff herein from interfering with the defendant's quiet enjoyment of the suit premises. So therefore, it cannot be true that the court in 2004 enjoined the plaintiff from entering into or remaining in the suit land. Even though the defendant had sought and was granted a declaration that the decree in favour of the plaintiff's late father had become unenforceable, she did not seek for the eviction of the plaintiff from the suit land. Most importantly, the defendant knew that the plaintiff was on the suit land.
 35. The defendant did not produce any evidence that she made an effective entry to the land and or sought an eviction order against the plaintiff in 2004, after the court had declared the previous decree unenforceable. Similarly, there was no evidence tendered that the defendant complained against the occupation of the plaintiff on account of a forcible detainer. There was no evidence tendered that the plaintiff all along has been subjected to forceful acts by the defence with the intention to evict him including threats of arrests and possible prosecution of illegal occupation coupled with violent incidents and or serious injuries as held in *Wilson Kazungu Katana and 101 others vs Salim Abdalla Bakshwein & another* (2015) eKLR. Additionally, the defendant did not dispute the exclusive possession and developments of the identified portion by the plaintiff as required in law as per *Githu vs Ndeete* (1984) KLR 776.
 36. In my considered view, the plaintiff's acts of occupation show that the defendant lost her rights on the suit land by being dispossessed or for having discontinued possession since 1988 and up to the time the suit was filed. In *Wilson (supra)*, the court held that time stops to run the moment a suit is filed anchored on adverse authority. In this suit, there is evidence that an order of *status quo* was issued in favour of the defendant in 2004, which in my view was sixteen years since the plaintiff entered the suit land. See *Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui* (2017) eKLR.
 37. In the case of *Titus Kiogoro Munyi vs Peter Mburu Kimani* (2015) eKLR, the court held in a claim of adverse possession, actual or constructive knowledge on the part of the registered owner must be proved. In this case, there is evidence that as at 2004, the plaintiff was asserting his possessory and occupation rights over the land. That is why he was seeking to be joined as a party to the 1988 case against the defendant. Adverse possession binds not only the present registered owner but also the successor or predecessors in title. Therefore, as at the time the land was registered in the name of the defendant on November 2, 2017, the rights of the plaintiff had accrued since 2004. This in my view did not interrupt or extinguish the claims by the plaintiff.
 38. The up short therefore is that the plaintiff has proved his claim. A declaration is hereby issued that the plaintiff be and is hereby entitled to 0.29 ha of LR. No. Ntima/Ntakira/763 by virtue of adverse



possession. The defendant to sign and transfer the said land within two months in favour of the plaintiff in default the same to be executed by the Deputy Registrar.

39. Costs to the plaintiff.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 15TH DAY OF MARCH, 2023

In presence of:

C/A: John Paul

Plaintiff

Defendant

Nyaga for defendant

HON. C.K. NZILI

ELC JUDGE

