



Kiruki & 2 others v Ruchugo (Sued as the Estate's Legal Representative of Ruchugo Munyari - Deceased); Marete (Interested Party) (Environment & Land Case 30 of 2020) [2023] KEELC 17703 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17703 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 30 OF 2020**

CK NZILI, J

MAY 31, 2023

BETWEEN

BENSON KIREMA KIRUKI 1ST PLAINTIFF

JANE KINYA KIRUKI 2ND PLAINTIFF

FLORENCE NGUUTA KIRUKI 3RD PLAINTIFF

AND

SAMSON MUTHURI RUCHUGO DEFENDANT

**SUED AS THE ESTATE'S LEGAL REPRESENTATIVE OF RUCHUGO
MUNYARI - DECEASED**

AND

FESTUS MUTHINJA MARETE INTERESTED PARTY

JUDGMENT

1. The plaintiffs took out an Originating Summons dated 1.4.2020, seeking to be declared entitled to a portion measuring 0.58 ha, out of the defendant's LR No Ntima/Ntakira/1058 under adverse possession. The originating summons was supported by two affidavits dated 1.4.2020 and 21.7.2021 of Benson Kirema Kiruki, the 1st plaintiff for and on behalf of his co-plaintiffs. In the affidavit, the plaintiffs averred that they have occupied and developed the suit premises for over 49 years exclusively, uninterruptedly and without any notice issued to them by the defendants to vacate the land. They attached copies of photographs, certificates of official search and witness statements in paginated bundles dated 21.3.2022 and 4.5.2023 respectively.
2. The defendant opposed the original summons through a reply dated 23.2.2023, witness statements and documents contained in a paginated bundle dated 23.2.2022. He averred that his late father, Ruchugo



- Munyari, used to own the suit land, which had been decreed to him through a confirmed grant. The defendant termed the case *res judicata* as an abuse of the court process because of a previous suit No Meru HC ELC No 68 of 1996. The occupation of the land as illegal, amounting to trespass and incapable of amounting to adverse possession.
3. By an application dated 15.9.2020, Festus Muthinja Marete sought to join the suit as an interested party, which request was allowed on 28.4.2013. In a replying affidavit sworn on 2.7.2021, the interested party averred that the plaintiffs were, among other families, mere licensees, accommodated on the suit land, including himself. He denied that the defendant was an occupant except for one M'Ikiara M'Itonga, his late grandfather whose grandchildren had been brought up on the land. The interested party averred that he had equal rights to demand the land as the plaintiff under Order 37 Rule 1 of the *Civil Procedure Rules*, which facts the plaintiff had failed to disclose before the court.
 4. At the trial, Benson Kirema Kiruki testified as PW 1. He adopted his affidavit, written statement dated 1.4.2020, and a further affidavit sworn on 21.7.2021 as his evidence in chief. He also produced a limited grant, photographs and an official search as P. Exh No's 1, 2(a) – (g) and 3, respectively. His testimony was that his late father, John Kiruki Marete, used to own LR No Ntima/Ntakira/1058, which he had inherited from his grandfather, the late M'Ikiara M'Itonga, whose sister was the mother of the defendant's late father, Ruchugo Munyari. He testified that the late M'Ikiara M'Itonga used to have three parcels of land which he shared out among his children, Daudi Ngara John Kiruki and Jared Kaibunga, with the late John Kiruki acquiring LR 1058. PW 1 told the court that Daudi Ngara disappeared, whereafter his wives and children were temporarily housed on the plaintiff's land, hoping their late father would resurface; he denied that the interested party had any equal rights to the land.
 5. In cross-examination, PW 1 acknowledged the 1st defendant as his cousin. Even though a succession cause had been filed in the estate of the 1st defendant, PW 1 told the court that he did not file a protest since he was unaware of it. Asked about the previous ELC case brought by his late father, the plaintiff acknowledged that the same was dismissed for non-prosecution. He confirmed that over twenty people occupied the suit land.
 6. Regarding the interested party, PW 1 told the court that he was his cousin who had been charged with malicious damage in Criminal Case No 946 of 2018, where he was the complainant. He clarified that the interested party was one of the 23 occupants on the suit land. PW 1 confirmed that he had never removed or stopped anyone from entering the suit land, including the interested party with a homestead in the subject land. PW 1 told the court that he did not intend to evict any of the twenty-three occupants from the land. He confirmed that the portion under his exclusive possession was 0.5 ha acres. In re-examination, PW 1 told the court that though the defendant had obtained a grant, he never ordered him out or claimed the land.
 7. Jane Kinya Kiruki & Florence Nguta Kiruki testified as PW 2 & 3, respectively. After adopting their written witness statements dated 21.3.2022, they told the court that the land originally belonged to their father-in-law. They termed the acquisition of the land by the defendant as unprocedural and done without the knowledge of the children and the estate of M'Ikiara M'Itonga, who occupy the land exclusive of the defendant.
 8. PW 2 & 3 confirmed that over twenty-three deceased relatives had a permanent homestead on 0.58 ha of the suit land. Further, PW 2 & PW 3 denied that the late Ruchugo Munyari had ever occupied or staked a claim on the ground, though he had obtained a confirmed grant to the estate without their knowledge, only as a nephew of the deceased uncle. PW 2 termed the title held by the defendant as illegally obtained. Further, PW 3 confirmed that the late father-in-law had three sons, Daudi Ngaala and John Kiruki, now deceased, whose children were all occupying the suit land. PW 3 clarified that



the defendant's late father had left out all the occupants in the succession cause, yet they were the immediate beneficiaries of the deceased's estate.

9. Samson Kimaita testified as PW 4. He adopted his witness statements dated 4.10.2021 and confirmed that the suit land belonged to and was occupied exclusively by the relatives or beneficiaries of the estate of the late M'Ikiara M'Itonga. M'Imbui M'Nkiruta testified as PW 5. He confirmed that the land belonged to and was occupied exclusively by the relatives or beneficiaries of the estate of the late M'Ikiara M'Gitonga.
10. M'Imbui M'Nkiruta testified as PW 5. He confirmed that the land belonged to the plaintiffs as the children or relatives of the late M'Ikiara M'Gitonga. His evidence was that Ruchugo Munyari, the father to the defendant, was a nephew who had never occupied the suit land. He told the court that the deceased M'Ikiara M'Gitonga had settled all his sons on the suit land, including the interested party. PW 5 believed that it would be unjust to evict all the occupants on the land, yet the defendant knew about the plaintiffs' possessory rights.
11. Samson Muthuri Ruchugo testified as DW1. He adopted his reply to the originating summons and witness statements dated 3.11.2021 and 23.2.2022, respectively, as his evidence in Chief. He produced an official search for the suit land as D. Exh No (1), proceedings before the arbitration board as D. Exh No (2), letters of grant as D. Exh (3), confirmation of grant as D. Exh No (4), summons for confirmation of a grant as D. Exh No (5), Chief's letter dated 8.4.1989 as D. Exh No (6), proceedings in Meru HC No 83 of 1980 as D. Exh No (7) and grant dated 6.7.1992 as D. Exh No (8). He admitted that all the plaintiffs and their children lived on the suit land.
12. DW 1 told the court that none of his developments or buildings were on the suit land. Similarly, he clarified that he had never lived on the land since his birth in 1954, which parcel of land was owned by his late father, who had told him before he passed on in 2009, that the land belonged to them. Further, DW 1 clarified that his late father never lived on the suit land and had he attempted to evict its occupants. He urged the court to determine who the rightful owners were since the land did not belong to the plaintiffs though they had been on it for over 12 years. Though D. Exh No (2) indicated that the land belonged to his late father; DW 1 told the court that his father never stopped the late M'Ikiara M'Gitonga from entering or occupying it. He denied obtaining any eviction orders against the plaintiffs besides the succession cause.
13. Further, DW 1 said that after his father obtained the title deed in 1992, he never took any action to evict the occupants from the land, even though none of the plaintiffs had protested the issuance of the confirmed grant. Similarly, DW 1 confirmed that he also obtained a grant in favour of the estate of his late father, which was not objected to by the plaintiffs. However, DW 1 noted that his late father was reluctant to evict or take up the land since his cousins occupied it.
14. Additionally, DW 1 reiterated that no one had ever objected to the propriety of the title deed. He urged that the inhibition orders be vacated, and eviction orders be issued so that the parties could find a way forward.
15. Festus Muthinja Marete testified as DW I.P. (2). He adopted his replying affidavit dated 2.7.2021 as his evidence in chief. His evidence was that he was born and brought up in the suit premises after his late father, Daudi Nkara, reportedly sold their land, following which his late uncle John Kiruki took him at the age of 10 years and settled him on the suit land.
16. At the close of the defence, parties were directed to file written submissions. The plaintiff, by written submissions dated 16.2.2023, took the view that they have satisfied the ingredients of adverse possession as regards possession and discontinuance of possession of the true owner with effect from



- 1971 and 1974, where they have carried out extensive developments on 0.50 ha of the land which the defendant and the interested party have admitted vital elements. Reliance was placed on [*Kasuve v Mwaani Investments Ltd and 4 others*](#) 1KLR 184, [*Munyaki Kuna Co., Nancy Wangari Muuni Wilson Njoroge Kamau v Nganga Muceru Kamau*](#), (2020) eKLR.
17. As to whether the defendant's title had been extinguished, the plaintiffs submitted that there was no dispute that the defendant became a registered proprietor under the arbitration decision of 9.3.1964 and subsequently acquired a title deed on 29.9.1992. So, since the entry was in 1971 when the 1st plaintiff got married and settled on the land, time to claim back the land was extinguished for the defendant never took back the land nor sought to evict them, including making an effective entry or possession, or by taking out legal proceedings against the plaintiff for the recovery of the land. Reliance was placed on [*Joseph Gachumi Kiritu v Lawrence Munyambu Kabura*](#) Court of Appeal No 20 of 1993. Therefore, the plaintiff submits that the defendant's title was extinguished in 1987 when the right to adverse possession accrued.
 18. On whether the reliefs sought should be granted, the plaintiff relied on [*Wilson Njoroge Kamau v Nganga Muceru*](#) (supra), on the proposition that a court, in deciding the issue of adverse possession, its primary function is to draw legal inferences from proved facts after which legal conclusion would be drawn from the findings of facts. Reliance was placed on [*Kiambi v Miriti*](#) (2022) KEELC 13299 (KLR).
 19. By written submissions dated 10.3.2023, the defendant emphasized that no claim had been made against him since he was not the registered owner of the suit land but the deceased. The defendant submitted that the applicant had come too late and that their rights could quickly have been addressed in Meru HC Succession Case No 275 of 2015. Further, the respondent submitted that an adverse possessor must prove continuous possession in an uninterrupted manner, inconsistent with the true owner's rights in an open, notorious, actual and exclusive possession or occupation thereof for the statutory period of 12 years. Reliance was placed on [*Phyllis Wanjiru Kamau v others*](#) (2019) eKLR, [*Regina Wanjiru Mwago & another*](#) C.A No 98 of 1998 and [*Mati Gitabi v Jane Kaburu Munga & others & Gitbu v Ndeete*](#) (1984) KLR 776.
 20. The issues calling for the court's determination are:
 - i. If the plaintiff has proved entitlement to 0.58 ha LR No Ntima/Ntakira/1058 under adverse possession.
 - ii. If the defendant and could be sued for and on behalf of the estate registered owner of the suit land.
 - iii. If the interested party has any bonafide claim to the land that has pleaded and proved against the defendant to the required standards.
 - iv. What is the order as to costs?
 - v. If the plaintiffs were justified in filing the suit, given the confirmed grant dated 15.5.2017.
 21. Adverse possession occurs when a trespasser enters into a land of a true owner and takes exclusive control of the land, openly, as of right, without interruption, notoriously without force for a period of 12 years either after dispossessing the owner or by the discontinuance of possession by the owner on his own volition. See [*Kasuve v Mwaani*](#) (supra).
 22. In [*Gatimu Kinguru v Muya Gathangi*](#) (1976) KLR, the court said that adverse possession is founded where a party does acts inconsistent with the enjoyment of the soil by the person entitled to it for the



- purpose for which he had a right to use it. The court observed that planting a boundary of tufts of nappier grass sufficed as best evidence as adverse possession like fencing off and cultivation of the land while the actual owner had notice of such matters.
23. In *Phyllis Wanjiru Kamau* (*supra*), the court cited with approval *Gabriel Mbui v Mukindia Maranya* (1993) eKLR, on the proposition that adverse possession refers to non-permissive physical control over land coupled with the intention of doing so, by a stranger, either on his behalf or on behalf of someone else in opposition to and to the exclusion of all others including the true owners with a clear knowledge of the true owner. The court held that the burden was placed on the plaintiff to prove actual occupation of the land exclusively and without permission of the true owner.
 24. As regards the role of the probate court adverse possession, the court in *Phyllis Wanjiru* (*supra*), cited with approval in *Re-estate of Alice Mumbu Mutua (deceased)* (2017) eKLR and *Priscilla Ndubi and another v Gerishon Gatobu Mbui* (2013) eKLR, that the probate courts sole purpose was to facilitate collection and preservation of the estate identifying of the survivors and beneficiary and distribution of the assets but lacks jurisdiction to determine the validity, enforceability of sale agreements and or defence claims on land by a person who are not heirs to the estate.
 25. Further, the court in *Phyllis Wanjiru* (*supra*) cited with approval Section 16 of *Cap 22* and its interpretation by the court in *Peter Mbiri Michuki v Samuel Mugo Michuki* CA Nyeri Civil Appeal No 22 of 2013, on the proposition that an administrator of the estate of a deceased person was taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of an administration, and the effect is that when the letters of administration are granted for the estate of the plaintiff, the administration of the estate relates back to the date of death.
 26. Additionally, the court cited with approval *Karuntimi Raiji v M'Makinya M'Itunga* (2013) eKLR, that a claim for adverse possession survives a deceased person since it was an overriding interest that subsists and affects the title.
 27. In this suit, the plaintiff's entry into the suit premises in 1971 and 1975 has been admitted by the defendant and the interested party. The plaintiffs have produced evidence of developments they have made on the suit land and, more specifically, on 0.5 ha of the land which as per the official search dated 8.4.2015 and produced as P. Exh No 3, came under the registration of the late Ruchugo Munyari on 28.9.1992 P. Exh No (1) is the letters of grant issued to the defendant. D. Exh No (4) is the confirmed grant issued to the defendant on 15.5.2017. It lists LR No Nitma/Ntakira/1058 as part of the estate of the late Ruchugo Munyari. The husband and father of the plaintiffs, John Kirigia, was listed as one of the beneficiaries to that estate as entitled to 0.0725 ha, alongside Ernest Gituma the defendant, Agnes Mwari, Gladys Kanyiri, David Muthee, James Nganga Ruchugo & James Mwangi.
 28. In D. Exh No (5), John Kirigia was listed as the son of the late Ruchugo Munyari. John Kirigia's signature appeared on the consent attached to D. Exh No(5). In the replying affidavit dated 25.2.2022, the defendant did not deny the plaintiffs' entry, possession, or developments. However, he termed the same as illegal and amounting to trespass or procuring by force. In his witness statement filed on 11.9.2021, the defendant confirms that M'Ikiara M'Itonga was a common grandfather to the 1st plaintiff, who, alongside Nkiriya M'Itonga, was gifted the land. The defendant stated that M'Ikiara M'Itonga was the initial registered owner of the land. Similarly, DW 1 also expressed in his witness statements the circumstances in which John Kiruki, the father to the 1st plaintiff and husband to the 2nd plaintiff, placed the caution dated 13.10.1996 and 18.10.1996, which is appearing on P. Exh No (1).
 29. DW 1, both in his affidavit in reply and the adopted witness statement, admitted that no effective entry, claims for eviction or vacant possession and or removal of the plaintiff were made right from the time D. Exh No 2 was determined and when D. Exh No (4) was eventually issued. It is inconceivable for



- the defendant to say that the plaintiffs were trespassers to his land and claim that there was previous litigation where the defendant's late father asserted ownership yet he failed to produce them as evidence to show that he has consistently resisted the occupation of the plaintiffs on his land.
30. For time to stop running, there must be an assertion of ownership rights, including filing a case and effective entry as held in *Githu v Ndeete* (1984) KLR, on the effective entry into the premises. In *Harrison Ngige Kaara v Gichobi Kaara & another* (1997) eKLR, the court held that possession was hostile if it was open, without right, without force or fraud and in exclusive use as if the land belonged to the adverse possessor. Further, in *Wambui Gikwa v Kimaru Muraba* (2016) eKLR, the court held that time stops to run when the adverse possessor admits the title holder's right. In this suit, the restrictions placed on the titles on 13.2.1996 and 10.11.1996 manifested that the plaintiffs' late father and husband was asserting rights adverse to those of the true owner.
 31. In *Mtana Lewa v Kabindi Ngala Mwangandi* (2015) eKLR, the court said that the primary justification for the law of adverse possession was the need to discourage land owners from sitting or sleeping on their land-related rights, since equity aids the vigilant and that paper owners of the land are encouraged to utilize their land or else a squatter would be prepared to make use of it, invoke the equitable defence of laches and the law to protect him. The court held that the law on adverse possession did not conflict with the *Constitution's* purpose, values and principles. Further, the court held that the limitation to land ownership through adverse possession was reasonable and justifiable in an open and democratic society based on human dignity, equity and freedom.
 32. In this suit, the plaintiffs have asserted his interest in occupying the land as if it was theirs. The defendant, on the other hand, has admitted the said occupation. Asked in cross-examination why he had not evicted or stopped the plaintiffs from occupying and or developing the land, he said that the plaintiffs were his cousins. He urged the court to determine who was entitled to the land. Looking at the circumstances of this suit, it is clear that the plaintiffs have demonstrated the animus possidendi to own the land as of right for over 12 years.
 33. Similarly, the defendant slept on his rights and let the plaintiffs lose to deal with the land in a manner inconsistent with his rights as the true owner. The defendant admitted in cross-examination that he had never occupied, utilized, developed and or dealt with the land in a manner one was expected to assert his possessory and ownership bundle of rights.
 34. This admission confirms that the plaintiffs have been in exclusive possession of 0.50 ha of the land and have discontinued possession of the true owner of the land. The defendant has not tendered a single complaint letter or an eviction order directed at the plaintiffs to cease and desist from entering, remaining, developing or occupying his land. The upshot is that the plaintiff has proved his claim to the required standard.
 35. As regard the interested party, his replying affidavit filed on 2.6.2021 confirmed that the defendant and his late father were never the occupants of the land, but the late M'Ikiara M'Itonga and his descendants among them, John Kiruki the father to 1st plaintiff and husband to the 2nd plaintiff. He stated that the deceased was holding the title in trust for the said beneficiaries who had equal rights alongside his to the land under Order 37 Rule 1 of the *Civil Procedure Rules*. The interested party never made a specific claim for the suit land. Order 1 Rule 10 (2) of the *Civil Procedure Rules* allows parties to join proceedings and participate thereof. See *Ngororo v Nduta & another* (1994) eKLR.
 36. In *Francis Karioko Muruatetu & another v Republic & others* (2016) eKLR, the Supreme of Kenya held that in every case, whether some parties are enjoined as interested parties, the issues to be determined by the court remain the issue as presented by the principal parties or as framed by the court from the pleadings and submissions of the main parties. The court said that an interested party may not



prepare new issues or introduce new issues for determination by the court. Further, the court held that an interested party who steers the court towards considering new issues should not be allowed to do so.

37. Going by the binding case law, I find no claim disclosed against the plaintiffs or the defendants by the interested party worthy of determining.
38. The upshot is that the plaintiff's claim is allowed. The plaintiffs are declared as entitled to 0.58 ha out LR No Ntima/Ntakira/1058. The defendant shall within 2 months sign the subdivision and transfer forms in favour of the plaintiffs in default of which the same shall be executed by the Deputy Registrar of this courts.
39. Costs to the plaintiffs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 31ST DAY OF MAY 2023

In presence of

C.A John Paul

Kirimi for Kariuki for plaintiffs

Riungu for interested party

HON. CK NZILI

ELC JUDGE

