



**Kimanzi v Mulwa (Environment & Land Case E005 of 2022)  
[2023] KEELC 20909 (KLR) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20909 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT & LAND CASE E005 OF 2022  
LG KIMANI, J  
OCTOBER 17, 2023**

**BETWEEN**

**MARY MAGDALENE KIMANZI ..... PLAINTIFF**

**AND**

**MARTHA MUTENDE MULWA ..... DEFENDANT**

**JUDGMENT**

1. In the Originating Summons dated 24<sup>th</sup> May 2022, the Plaintiff claims to be entitled to ownership by adverse possession of land parcel No. Matinyani/Kalindilo/572 and registration of the title in her favour. She seeks a determination of the following questions:
  - a. Whether the plaintiff is entitled by virtue of adverse possession to all that parcel of land known as Matinyani/Kalindilo/572 which is registered in the name of the Deceased.
  - b. Whether the Plaintiff should be registered as proprietor of all that parcel of land known as Matinyani/Kalindilo/572 which is registered in the name of the deceased.
  - c. If answers to (a) and (b) above are in the affirmative, whether the court should make declarations and orders directed to the Kitui County Lands Registrar to give effect to the said findings.
  - d. Whether the plaintiff should be paid the costs of this suit.
2. The plaintiff claims that the defendant is the administrator of the estate of the late Mulwa Mue (Deceased) in whose name the suit land is registered. She states that she has been occupying the suit land for an uninterrupted period of more than twelve years since 29<sup>th</sup> June 2008 and that her occupation has been without permission and adverse to the interests of the defendant and the estate of the deceased.



3. The plaintiff further states that she has developed and heavily invested in the land and the defendant has known her possession of the land. She further claims that the defendant and the beneficiaries of the deceased's estate have never used the land.

### **The Defendants' Replying Affidavit**

4. The defendant filed a replying affidavit on 20<sup>th</sup> October 2022 stating that the application herein is misconceived and fictitious and the same should be dismissed. She acknowledged that the suit land Matinyani/Kalindilo/572 is registered in the name of her late husband Mulwa Mue (Deceased) who died on 29<sup>th</sup> November 1999.
5. According to the plaintiff's documents, she entered into and trespassed onto the suit land on 29<sup>th</sup> June 2008, ten years after the defendant's late husband's death. The defendant states that she resides far away from the suit land and that when her husband died she was left with young children and she did not realize that the Plaintiff had entered into the suit land since she had to work in people's homesteads to fend for her young children.
6. The Respondent deposed that she only recently realized that a stranger had fenced off the suit land when she was called by a gentleman named Boniface to sign some documents and be given some money but she refused. She urged the Court to dismiss the plaintiff's application as she wants to dispossess her of her husband's land yet she has several children.

### **Evidence at the trial**

7. PW 1, Mary Magdalene Kimanzi the plaintiff herein testified and relied on her supporting affidavit and annexures thereto. She stated that from the year 2008, she has constructed, cultivated and kept cattle on the suit land. She stated that on or about 29<sup>th</sup> June 2008, one Weneslas Nzomo Kikungu (now Deceased) had represented to her that he was the owner of the suit land Matinyani/Kalindilo/572. She developed an interest in purchasing the land together with land parcel numbers Matinyani/Kalindilo/515 and 573 which were adjacent to each other. She stated that she bought the land for Ksh. 305,000 and was allowed occupation.
8. The plaintiff avers that she was not able to transfer the suit land to her name because she discovered that there was a different registered owner. She claims that she has been in occupation of the suit land for over twelve years, established her home, and fenced the land with the knowledge of the defendant and the deceased's family members and beneficiaries.
9. The Applicant further stated that her entry and occupation of the suit land was not with permission, license or consent of the respondent or any of the deceased's beneficiaries and the respondent has never tried to evict her.
10. The plaintiff attached to the supporting affidavit and produced in court the following documents;
  - A. Certificate of search for Matinyani/Kalindilo/572,
  - B. Agreement
  - C. Copies of title deeds for Matinyani/Kalindilo/515 and Matinyani/Kalindilo/573,
  - D. Photographs mentioned as MM4 were not attached to the affidavit
11. On cross-examination, she stated that she did not know the defendant but had only heard about her. She stated that when she wanted to bury her daughter-in-law she got to know the defendant and discovered that Nzomo Kikungu did not own the suit land. She stated that when she bought the 3



parcels of land, she had thought that it was only one parcel. It was only after buying the land that she knew of the parcel number Matinyani/Kalindilo/572.

12. DW1, Martha Mutende Mulwa the defendant herein, testified and relied on her replying affidavit sworn on 20<sup>th</sup> October 2022. She stated that she did not know the plaintiff and that she had never seen her. She however stated that the fence around the suit land was put up a year or two ago. She produced in evidence the death certificate for Mulwa Mue who died on 29<sup>th</sup> November 2009.
13. The defendant denied knowing whether the Applicant had buried her child on the suit land. On re-examination, she confirmed that her name is also Rose Mulwa and confirmed that her deceased husband's land is indeed the suit land. She stated that she did not know Weneslas Nzomo Kikungu. She knew the land in dispute as belonging to her since 1975.
14. She stated that the plaintiff bought a small parcel of land but fenced a bigger portion including her land which she did about two years ago. She stated that she has only cultivated a small portion of the land
15. DW 2, Charles Manguye Mue testified and relied on his witness statement filed on 7<sup>th</sup> November 2022 where he stated that he is a brother-in-law to the defendant and that when her husband died, she used to work on people's homesteads far away from the suit land since she was left with young children.
16. He testified that the defendant did not know that the plaintiff had occupied her late husband's land since the land is far away from where she resides. He urged the Court to dismiss the application.

#### **Plaintiff's written Submissions**

17. Counsel for the plaintiff submitted that after execution of the agreement for sale, the plaintiff constructed permanent structures and even went ahead to cultivate on the suit land and has even buried her daughter-in-law on the suit land. The occupation was not with permission, license or consent of the Defendant or any of the deceased's beneficiaries. The occupation has been open, continuous and uninterrupted according to the Applicant.
18. Quoting from Section 38 of the Limitation and Actions Act, the Applicant's submission is that she is entitled to be registered as the proprietor of the suit land. Relying on Angote J's decision in the case of Simon Kilige Kingoo & 11 others vs Amos Kamia Nguku & 4 others (2019) eKLR, where he expressed that the entry of an adverse possessor on land need not be legal, but must be under some right.
19. On the elements necessary for adverse possession, counsel for the Applicant submitted that there must be actual, open possession, uninterrupted possession, notorious, hostile, exclusive and continuous use of the land. He relied on the case of Kweyu vs Omutut (1999) KLR 709.
20. It was submitted that at no time has the defendant visited the suit land and asked the Applicant to vacate the same nor has she ever bothered or interrupted her peaceful occupation, while she has known the Applicant. Counsel for the Applicant submitted that she had proven her case beyond reasonable doubt and prayed that the Originating Summons be allowed.

#### **The Defendants' written submissions**

21. Counsel for the defendant submitted that by the time the plaintiff had bought the suit land on 29<sup>th</sup> June 2008, the registered owner of the land had already passed on and no evidence was led to prove that the respondent was an administrator of the deceased's estate.
22. Further, it was submitted that the respondent's testimony that the applicant is unknown to her was corroborated by another witness and that they only noticed that it was only in the year 2021 that they noticed that the Applicant had fenced off the land parcel belonging to the deceased.



23. The respondent's submission is that the Applicant in this case has not demonstrated adverse possession of the suit land because it was not open and continuous as required by the precedents in Patrick Magu Mwangi Kimunyu-vs Joreth Limited (2015) eKLR, Ndatho-vs- Itumo & 2 others (2002) 2KLR 637 and Wambugu vs-Njuguna(1983)KLR 174 cited in Karuntimi Raiji-vs M'makinya(2013)eKLR.
24. Counsel terms the applicant's occupation as illegal trespass and there is no defined time within which the Plaintiff's rights should be deemed to have started accruing and urged the court to dismiss the case with costs.

### **Analysis and Determination**

25. Based on the pleadings filed herein, the evidence adduced and submissions filed by Counsel, it is the court's view that the following issues arise for determination;
  - A. Whether the Originating Summons filed is properly before the court
  - B. Whether the plaintiff is entitled by virtue of adverse possession to all that parcel of land known as Matinyani/Kalindilo/572 which is registered in the name of the Deceased.

#### **A. Whether the Originating Summons filed is properly before the court.**

26. The plaintiff claims a right of adverse possession over the suit land claiming that she has been in possession of the same since the year 2008 when she bought it through an Agreement for sale of land dated 29<sup>th</sup> June 2008 from one Weneslas Nzomo Kikungu.
27. Section 7 of the *Limitation of Actions Act* of 1968 provides that:

“An action may not be brought by any person to recover the land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

#### **The 1<sup>st</sup> question raised by the respondent is whether the applicant has sued the right party.**

28. It is an acknowledged fact that the suit land Matinyani/Kalindilo/572 is registered in the name of Mulwa Mue (Deceased). Counsel for the defendant contends that the plaintiff has failed to show that the defendant is the personal representative of the deceased's estate. It is indeed true that the plaintiff did not attach to her supporting affidavit or produce evidence during trial letters of administration to the deceased's estate or any other evidence to show that the defendant herein is a personal representative of her deceased husband's estate. The Originating Summons herein indicates that the defendant is sued as administrator of the estate of Mulwa Mue. However, in the court's view it is not enough to designate the defendant as administrator, the plaintiff needed to prove as a fact that the defendant was sued in the said capacity.
29. The right to recover land as stated under Section 7 of the *Limitation of Actions Act* could only accrue to the registered owner of the land, Mulwa Mue, or the personal representative of his estate since the right to recover land in the hands of a trespasser accrues to the owner of the land.
30. The Court of Appeal in the case of Mwinyi Hamisi Ali vs. the Attorney General & Another [1997]eKLR re-stated the position that adverse possession can only be claimed against a properly registered owner. The court went on to say that;

“Adverse possession can only be claimed against a properly registered owner, that is to say, the possession must be adverse to that of the registered proprietor. In this case, the registered



proprietors were Captain Townsend and the other three persons earlier referred. All of them had died by the time the suit in the superior court was filed. The names of the personal representatives of the said four persons were well within or could with reasonable diligence be within the knowledge of Mr. Hamisi Ali's legal advisers. None of them were made parties to the suit. The claim for adverse possession was, therefore, with respect to Mr. Hamisi Ali's advocates and the learned judge, misconceived. In order that Mr. Hamisi Ali could claim, successfully, title by adverse possession, he had to show that the title of the said four persons stood extinguished. That can only be done if the title holders were parties to the suit. In our view, the learned judge erred when he proceeded to decree title by virtue of adverse possession when the registered proprietors were not parties to the suit.”

31. Further, section 82(b)(ii) of the *Law of Succession Act* Cap 160 Laws of Kenya provides for the powers of personal representatives and states that they shall, subject only to any limitation imposed by their grant, have the following power;
- 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.

Section 2 of the *Civil Procedure Act* defines a legal representative as;

“means 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 who the estate devolves on the death of the party so suing or sued.”

32. The Court in the case of *Abdirashid Adan Hassan v Estate of W H E Edgley* [2022] eKLR found proceedings to be null and void where there was nothing to show that the estate of the deceased person had a legal representative, stating that:

“...no evidence was tabled to show that there is a legal representative of the Defendant as contemplated by Section 2 of the *Civil Procedure Act*.”

Section 2 of the *Civil Procedure Act* defines legal representatives as follows: -

“means 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 who the estate devolves on the death of the party so suing or sued”.

One cannot claim the estate of a deceased person. A suit against the estate of the deceased requires an application for a grant to have locus standi. In the case of *Julian Adoyo Ongunga v Francis Kiberenge Abano* Civil Appeal No. 119 of 2015, Justice A. Mrima stated as follows: -

“The impact of a party without locus standi can be equated to that of a court acting without jurisdiction. Since it amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

33. In the present case, it has not been shown that the defendant has the relevant locus standi to represent the estate of the deceased Mulwa Mue. The suit against her cannot stand on that basis. The court further finds that under Section 45(1) of the *Law of Succession Act* any person taking possession or disposing of, or otherwise intermeddling with, any free property of a deceased person commits a criminal offence. The said section provides that:



1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
  2. Any person who contravenes the provisions of this section shall-
    - a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment
    - b. be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration; and
34. In the present case, the plaintiff stated that she purchased the suit land from one Weneslas Nzomo Kikungu (now Deceased) on or about 29<sup>th</sup> June 2008, entered onto the land, took possession thereof and started use and development of the same on the strength of the said sale. This was clearly in contravention of the above-quoted Section 45(1) of the *Law of Succession Act* since at the said time the registered owner was already deceased. When she discovered that she had taken possession and use of the land belonging to a deceased person she did not vacate the land but instead filed the suit before the court.
35. It is trite law that no court will enforce an illegal contract or enforce obligations in a contract declared illegal. The Court of Appeal in *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR considered the provisions of Section 6 (1) and 22 of the *Land Control Act* where possession of the land had been taken and where land control board consent had not been obtained. The court stated as follows;

“Thirdly, for actual possession of land to amount to an overriding interest within the meaning of section 30(g) of the repealed Registered *Land Act*, that occupation must be occupation, which in law, is not declared to be illegal. We have already noted that under section 22 of the *Land Control Act*, occupation of agricultural land pursuant to a transaction, which has not obtained the consent of the relevant control board, is a criminal offence. To that extent, such occupation cannot, with respect, constitute an overriding interest.”

The Court went on to state that one of the effects of illegality of a contract is for it be declared void ab initio if the contract has been declared expressly or impliedly illegal by statute. The court stated as follows:

“To hold that occupation that is declared by statute to be illegal can constitute an overriding interest would, with respect, amount to the courts recognizing and enforcing conduct that is by law declared to be illegal. No court of law will enforce an illegal contract or one, which is contrary to public policy. Decisions of this Court abound on the point. In *Mapis Investment (K) Ltd v Kenya Railways Corporation* [2005] 2 KLR 410 this Court cited with approval Lindley L.J in *Scott V Brown, Doering, MCNAB & CO* (3) [1892] 2 QB 724, at 728 as follows;

“Ex turpi causa non oritur action. This old and well-known legal maxim is founded in a good sense and expresses a clear and well-recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly



brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him." (Emphasis added).

Earlier in *Patel v Singh (No 2)* [1987] KLR 585 at 588, this Court, relying on the words of Devlin L.J (as he then was), in *Archbolds (freightage) Ltd v S. Spanglett Ltd* [1961] I QB 374 at 388 reiterated:

"The effect of illegality upon a contract may be threefold. If at the time of making the contract, there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract, he had no intent to break the law and that as the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy." (Emphasis added).

36. In the present case, it is the court's finding that the plaintiff is prevented in law from recovering land and enforcing rights and interests purported to have arisen and/or accrued out of a transaction of sale and possession of land that have been expressly declared by statute to be illegal.
37. The court thus finds the suit herein to be incompetent, bad in law for illegality and the same is for striking out.

**B. Whether the plaintiff is entitled by virtue of adverse possession to all that parcel of land known as Matinyani/Kalindilo/572 which is registered in the name of the Deceased.**

38. In the case of *Mtana Lewa –vs- Kahindi Ngala Mwangandi* [2015] e KLR the court of Appeal defined adverse possession as:

"Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in the assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner."

39. As confirmed by both parties to this suit, land parcel No. Matinyani/Kalindilo/572 is registered in the name of Mulwa Mue (Deceased) and the said owner died on 29<sup>th</sup> November 1999. From the foregoing authority of *Mtana Lewa (supra)*, the person who would have taken any action to recover the land in the event of trespass and the only person that can be said to have omitted to do so would be Mulwa Mue or the personal representative to his estate and not the defendant herein.
40. Further, in the case of *Daniel Kimani Ruchire vs Swift Ruther Food & Co. Ltd* (1980), KLR Kneller J stated that the registered owner must know that he has been ousted:

"The Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the Plaintiff must show



that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration.” One must show that they are in long exclusive, uninterrupted possession, possession is hostile to the rights of the registered owner and the registered owner is aware; possession has as much publicity as not to be missed by the registered owner.”

41. In the present case, the claim for adverse possession cannot hold against the defendant herein since she is not the registered owner of the suit land and she has not been shown to be the Administrator of the estate of the deceased Mulwa Mue, the registered owner. The suit herein is thus found to have no merit under the 2<sup>nd</sup> issue.

#### **Final orders of the court**

1. The suit herein is found to be improperly before the court, incompetent, and bad in law and the same is hereby struck out.
2. On the merits of the case, the plaintiff did not prove that she is entitled by virtue of adverse possession to land parcel No. Matinyani/Kalindilo/1572 which is registered in the name of the deceased. This suit is therefore for dismissal if the same had not been struck out.
3. Costs of the suit are awarded to the defendant.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 17<sup>TH</sup> DAY OF OCTOBER, 2023.**

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

Judgment read in open court and virtually in the presence of;

Musyoka – Court Assistant

Kithome for Respondent

B. M. Musyoki for the Plaintiff

