



REPUBLIC OF KENYA



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**Kirimania v M'Iniu & 4 others (Environment & Land Case  
117 of 2008) [2022] KEELC 3419 (KLR) (18 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3419 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 117 OF 2008**

**LN MBUGUA, J  
MAY 18, 2022**

**BETWEEN**

**PETER KIOGORA KIRIMANIA ..... PLAINTIFF**

**AND**

**M'ITONGA M'INIU ..... 1<sup>ST</sup> DEFENDANT**

**JOHN GIKUNDA M'RUKARIA ..... 2<sup>ND</sup> DEFENDANT**

**JULIUS KITHINJI M'RUKARIA ..... 3<sup>RD</sup> DEFENDANT**

**M'MBIJIWE RUTERE ..... 4<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. The plaintiff is the registered owner of the land parcel No Abothuguchi/Kithirune/2264 (the suit land) which was a resultant subdivision of parcel Abothuguchi/Kithirune/770 which in turn was owned by his father, M'kirimania M'ikiara. The defendants are claiming the suit parcel No 2264 on the basis of ancestral roots.
2. Vide the amended plaint dated October 8, 2009, the plaintiff prays for the following orders;
  - a. An order directing the removal of the restriction placed against the plaintiff's title for land parcel No Abothuguchi/Kithirune/2264.
  - b. An order for permanent injunction against the defendants, their servants, agents, employee, assignees and or anybody else acting on their behalf from entering and or interfering in anyway with plaintiff's land parcel No Abothuguchi/Kithirune/2264.



- c. Costs of the suit.
3. The defendants through their amended statement of defence and counter claim dated June 23, 2017 denied the plaintiffs claim contending that the suit land parcel 2264 is family/ancestral land and hence plaintiff holds the same land in trust for them. The defendants therefor pray for the following orders in their counter-claim;
  - a. Transfer of half of LR No Abothuguchi/Kithirune/2264.
  - b. An order empowering the executive office of the court to execute all the transfer documents over LR No Abothuguchi/Kithirune/2264 in the default of the defendant doing so.
  - c. A declaration that the plaintiffs are entitled to half of LR No Abothuguchi/Kithirune/2264 by operation of the law of *Limitation of Actions Act*.
4. The plaintiff had filed an application dated September 26, 2014 seeking injunctive orders against the defendants and few days later, on October 14, 2014 the advocates for the parties agreed by consent that a scene visit be conducted. The court gave directions that the Executive Officer of the court be the one to conduct the scene visit. He complied and the report dated November 13, 2014 was availed to the court on December 11, 2014. The court had directed parties to get copies of the scene visit report. However, nothing more was heard about that report thereafter.
5. It appears that the plaintiff had filed another application dated January 30, 2015 for contempt of court orders and the prosecution of the two application took centre stage but eventually the determination of the said applications, just like the issue of the scene visit report fizzled away.
6. In view of the fact that no directions were given regarding the scene visit report, the court shall not make reference to the same.
7. The case was partly heard before my brother Judge Cheron before I took over the matter.

### **The Evidence**

8. PW1, Peter Kiogora Kirimania adopted his two statements one dated March 25, 2014 and another dated July 19, 2017 as his evidence. He avers that his father, one M'kirimania M'ikiara owned land parcel No Abothuguchi/Kithirune/770 which he gathered and lived on the said land with his nuclear family to the exclusion of all other persons. The father was registered as the owner of this land in 1963. That during demarcation and registration of land, each of his late father's brothers gathered their own respective parcels of land and none of them had land cases with his father.
9. In 1999, PW1's father sub-divided land parcel No Abothuguchi/Kithirune/770 into three parcels; namely parcel 2262 which went to Jacob Mwongera, 2263 which went to Douglas Muchido, both being brothers of PW1, while parcel 2264 was registered in PW1'S name as a minor and that of his father. His father died in year 2007 and PW1 became the owner of the suit land.
10. PW1 contends that his brothers are his neighbours to the suit land and none of the defendants have ever occupied that land.
11. PW1 filed this case because the defendants had attempted to enter the suit land and they had caused damages to his property.
12. In support of his case, PW1 produced the documents in his list dated March 25, 2014 as P Exh 1- 12 and those in his list dated July 19, 2017 as P Exh 13 & 14 respectively.



13. PW2, Jacob Muriiraidentified himself as a brother of PW1. He adopted his statement recorded on March 25, 2014 as his evidence. His testimony is more less similar to that of his younger brother (PW1). He added that their father openly sub-divided parcel No Abothuguchi/Kithirune/770 in 1999 to his sons. Their father had warned them not to interfere with Plaintiff's share of the land, who was a minor by then. However as at the time of the demise of their father in year 2007, PW1 was of majority age and was able to pursue his title. PW2 further stated that it was only after the death of their father that defendants started claiming the suit land.
14. PW2 also stated that defendants stay far away from the suit land and that plaintiff's family doesn't own land where defendants have their land. He denies that there was ever any meeting to resolve how the suit land was to be sub-divided and he is not aware that defendants ever had coffee on the suit land. He also denies that their father ever had a will regarding the suit property. Finally, he denies that defendants are his relatives and that if they were, then it is a distant relationship.
15. DW1 John Gikundaadopted his statement dated June 23, 2017 as his evidence. His statement contains a diagram capturing the relationship of the parties. He initially stated that he is a son of M'Iniu brother of Kiara. He later clarified that he is a son of a child of M'Iniu. That 1st defendant (who is deceased) is also a son of M'Iniu. Thus DW1's father (M'Rukaria) and M'Itonga are brothers. Julius Kithinji (3rd defendant) is his brother. The entire family traces its root to one Bwabu.
16. At this juncture it is pertinent to capture the diagram availed by DW1 to appreciate the relationship of the family members.  
 Bwabu M'kagiri  
 M'iniu Kiara Gichera Kimuru  
 M'itonga M'rukaria Francis M'nkanata M'mwambi Ngaruchi M'ungi  
 Mwambia& others Gikunda Kithinji,Kiogora
17. DW1 contends that during demarcation time M'kirimania M'ikiarawas nominated by the family to follow up on the issue of demarcation and registration of land on behalf of the family, and that is how he was registered as owner of parcel No Abothuguchi/Kithirune/770 to hold in trust for the other family members.
18. He contends that in 1999, M'Kirimania subdivided the parcel LR No Abothuguchi/Kithirune/770 amongst his sons but gave him assurance that he would not interfere with the land which defendants owned. He also promised to transfer their portions to them.
19. M'Kirimania had registered parcel No. Abothuguchi/Kithirune/2264 in his own name and that of plaintiff, but upon his death, PW1 transferred this land to himself.
20. DW1 contends that though he did not live on the suit land, he had planted coffee bushes and had also allowed one M'Mungania to plant food crops even before the death of M'Kirimania. However, when M'Kirimania died, PW2 chased M'Mugania away from that land.
21. DW1 further stated that on 6.6.2008, an elders meeting was held which resolved that plaintiff did not own the whole land but only part of it while the rest was owned by the defendants. He contends that he is in possession and occupation of part of the suit land.
22. In support of their case, DW1 produced the documents in their list dated June 23, 2017 as D Exh 1-8.
23. DW2, Patrick Mwebiaadopted his statement dated June 23, 2017 as his evidence. He avers that he was a trusted friend of M'Kirimania. That on August 2, 1995, M'Kirimania visited him and found him



- with his wife, he informed DW2 of how he wanted the land to be subdivided, whereby he wanted to give some land to defendants. DW2 wrote down whatever M'Kirimani said but the latter did not sign.
24. After the death of M'Kirimania, elders resolved that the suit land was held by plaintiff and defendants as rightful owners.
  25. DW3 is one M'mbijiwe M'rutereand he adopted his statement dated June 23, 2017 as his evidence. He contends that he occupies a portion of the suit land having acquired the same from his mother Tabitha Muthoniwho in turn had bought the land from one M'Muguna who had bought the land from plaintiff's extended family.
  26. DW3 stated that from the time M'Kirimania became the registered owner of the land to when he died, the defendants were always asking for their share of land and that M'Kirimania had no problem with that. DW3 was aware that M'Kirimania had divided his land but that was still not a problem as M'Kirimania had never declined to give them their land. However, after the death of M'Kirimania, they were evicted.

### Submissions

27. It was submitted for the plaintiff that defendants had not proved that land parcel No Abothuguchi/Kithirune/770 was registered in the name of M'Kirimania in 1963 to hold in trust for the defendants, that defendants had not tendered any evidence of adjudication records, particularly the record of existing rights (RER) to prove their right of occupation of land. That there was also no evidence to show that Plaintiff's father was actually appointed by the clan or family to hold the said land in the capacity of a trust.
28. It was also submitted that M'Kirimania died on December 22, 2007 aged 79 years and that during his life time, none of the Defendants filed any cases against him to claim the land. That defendants only started raising their claim after the death of M'Kirimania.
29. It was also submitted that the scene visit report had showed that Plaintiff owned the properties on the suit land.
30. The plaintiff relied on the cases of *Patrick Mathenge Gachii & 3 others v Karumi Wambugu & another* [2010] eKLR, *DT Dobie & Co K Ltd v Wanyonyi Wafula Chebukati* [2014] eKLR, *Mungai Mulango & Another v Jeremia Kiarie Mukoma* [2015] eKLR, *Joseph Mbuta Nziu v Kenya Orient Insurance Co Ltd* [2015] eKLR, *Mbira v Gachibi* (2000) I EA and *Captain Harry Gandy v Casper Air Charters Limited* (1956) EACA.
31. For the defendant, it was submitted that before registration of parcel No Abothuguchi/Kithirune/770, the said land belonged to both plaintiff's and 1st – 3rd defendants' families as they all belong to the same clan. The court was urged to see the relationship of the parties as captured in the diagram of DW1.
32. It was further submitted that 4<sup>th</sup> defendant had inherited his portion from his mother who in turn had bought the land from plaintiff's family members. Thus, there is a constructive trust between the plaintiff and defendants who are now entitled to a share of parcel No Abothuguchi/Kithirune/2264.
33. No submissions were made in support of entitlement to the suit land through operation of the law of *Limitation of Actions Act*.
34. In support of their case, defendants relied on the cases of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR, and *Gideon Mwangi Chege v Joseph Gachanja Gituto* [2015] eKLR.



## Determination

35. I have considered the pleadings herein, the evidence, the rival submissions the legal framework and the prevailing jurisprudence. It is not in dispute that the land parcel No Abothuguchi/Kithirune/770 was registered in the name of Plaintiff's father, M'Kirimania M'Ikiara on April 3, 1963. It is also not in dispute that the said land was subdivided sometime in the year 1999, of which one of the resultant parcels was No Abothuguchi/Kithirune/2264 (the suit land), which was registered in the name of the plaintiff's father as well as the plaintiff, the latter being a minor. It is again not disputed that plaintiff is now the sole registered owner of the suit land.
36. DW1 had claimed that 1<sup>st</sup> defendant who is his uncle is deceased. No further or better particulars were availed regarding his claim hence, I will consider his claim as none existent.
37. I find that the issues arising for determination are; whether the plaintiff is holding the land parcel No Abothuguchi/Kithirune/2264 in trust for defendants, and whether the defendants are entitled to the suit land by way of adverse possession. If the answer to the two issues is not affirmative, then the prayers sought by the plaintiff would be justified.
38. Section 28 of the *Land Registration Act* provides that;
- “Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—
- (a)
- (b) trusts including customary trusts;”.
39. Trust including customary trust must however be proved. In the Court of Appeal decision *Mumo v Makau* (2002) 1 EA 170, it was stated that;
- “trust was a question of fact to be proved by evidence.....”.
40. In the case of *Susan Mumbi Waititu & 2 others v Mukuru Ndata & 4 others* [2008] eKLR Justice MSA Makhandia stated that:-
- “As for trust, the plaintiffs must prove with cogent evidence that the suit premises was ancestral land and thus family land. In the circumstances of this case, the plaintiffs have miserably failed in this onerous task. .... Trust cannot be imputed. It must be proved. In the absence of such proof, I find and rule that there was no trust envisaged by the 1<sup>st</sup> defendant in favour of the plaintiffs”.
41. Section 107 of the *Evidence Act* provides that:
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
- Thus the burden of proof befalls upon the defendants to prove the existence of a customary trust for their counter claim to succeed.



42. As stated earlier herein, M’Kirimania was registered as the owner of the land parcel No Abothuguchi/Kithirune 770 in 1963. A copy his death certificate availed as P-Exhibit 3 indicates that he died aged 79 years in year 2007. During his lifetime, none of the defendants asserted their claims over the suit property ostensibly because at no time did M’Kirimania refuse to recognize their claim. However, this is a toll order particularly considering that in 1999, M’Kirimania had gone ahead to subdivide the land No Abothuguchi/Kithirune/770 into 3 parcels, two of which he gave his sons Jacob and Douglas while he had the suit land No 2264 registered in his name and that of his minor son, the plaintiff.
43. I find that the move taken by M’Kirimania to subdivide the land in 1999 leaving none to defendant puts to rest any claim that M’Kirimania had in 1995 expressed his wish to give defendants a portion of the suit land as claimed by DW2. In any event, DW2 does admit that M’Kirimania did not sign anywhere that his wish was to give defendants land.
44. In the case of *Peter Nyaga Kairu v Esther Wanjiku Njau & 5 others* [2019] eKLR, one Nyaga, the plaintiff was claiming the land of his brother Njau many years after the death of Njau on the basis of trust. I stated thus;
- “It was not open to plaintiff to shift this burden of proof upon the defendant. Plaintiff had over 14 years to sort out all these issues during the life time of his brother (deceased). The Latin phrase “*mortui non mordent*”, which means dead men don’t tell tales, dead men don’t bite is very much applicable in this case.”
45. The above phrase is likewise applicable in this case. That for a period of 44 years from 1963 when M’Kirimania was registered as owner of parcel 770 to 2007 when he died, the defendants never asserted their claim of trust in the suit land. Their clamour for the land only commenced after the death of M’Kirimania.
46. It has also emerged that plaintiff and defendants are not what you would call close relatives. PW1 and his brother PW2 don’t even identify defendants as their relatives. DW1, (2<sup>nd</sup> defendant) stated that his father was one M’Rukaria son of M’Iniu thus the latter was his grandfather. That M’Itonga (1st defendant) was also son of M’Iniu who was a brother to Kiara, Gichera and Kimuru. I discern that Kiara is the father of Francis, who in turn is the father of the plaintiff. Thus M’Kirimania must be the same person as Francis, who is brother to M’Nkanata, M’Mwambi, Ngaruchi and M’Mungi as per DW1’s Diagram and evidence. If this be true, then the father of DW1 (M’rukaria) and father of PW1 (Francis) were cousins.
47. During his testimony in court (a rather lengthy cross examination) DW1 stated that :
- “M’Iniu is father of my father. M’Iniu has his own land.
- Gichera was a brother of Kiara and M’Iniu. Gichera had his own land and so did Kiara and M’Iniu.
- The sons of Kiara (namely children; Francis Kirimania, Nkanata, Mwambi, Ngaruchi, M’Mungi) have not asked for land from Gichera and M’Iniu’s children”.
48. DW1 had also stated that:
- “I have built on the parcel I bought. There before, I was staying at Kithirune which land belonged to the family but it was registered in the name of M’Iniu. 1st Defendant, M’Itonga



is my younger father. M'Itonga is a son of M'Iniu. So my father and M'Itonga are brothers. So the land I was staying at was in name of M'Iniu. It was family land”.

49. What resonates from the above evidence is that even at the level of the plaintiff's and DW1's grandfathers namely the 4 brothers that is M'Iniu, Kiara, Githera, and Kimuru, each family had their own lands. There is hence not the slightest logical explanation as to why the children of the sons of M'Iniu (read DW1) would now want a share of the land from the child (read plaintiff) of a son (read M'Kirimania) of Kiara.
50. I find that there is not the slightest evidence to connect PW1's land to any ancestral land claim as alleged by DW1, hence the case of *Isack M'Inonga Kiebia v Isaaya Theuri M'Lintair & another* [2018] eKLR, is not applicable herein.
51. This is a situation whereby the defendants don't reside on the suit land. During his life time, the registered owner of the larger parcel No Abothuguchi/Kithirune/770 did not in any way deal with the land in a clandestine manner. He did what a reasonable ageing man would do, that is subdividing his land to his children after a hiatus of 36 years (from 1963-1999), making sure that he took into account the interests of his minor child.
52. The upshot of these findings is that defendants have not proved their claim of trust. I must add that the 4<sup>th</sup> defendant is not even sure as to how his mother's claim arose; whether she bought the land from plaintiff's family or whether one M'Muguna is the one who bought the said land, who actually sold and when the transactions happened.

### **Adverse Possession**

53. In their counterclaim, the defendants also claim the suit land by operation of the law of *Limitation of Actions Act*. A person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption; See *Mbira v Gachubi* (2002) I EALR, *Mtana Lewa v Kabindi Ngala Mwangandi* - CoA Malindi [2015] eKLR, *Paul Mwangi Gachuru v Kamande Nguku* [2017] eKLR .
54. The defendants do not reside on the suit land, they do not utilize the same and if they did (as they so claim), that was in the past as such use was interrupted by their alleged eviction by PW2. To this end, the claim of adverse possession must fail.

### **Conclusion**

55. In the final analysis, I find that the claim of the defendant anchored on trust or adverse possession has not been proved on a balance of probabilities. In that regard, plaintiff is declared to be the rightful proprietor of the suit land, and he is supposed to enjoy those rights along with all the privileges appurtenant thereto as set out under section 25 of the *Land Registration Act*, free from all other encumbrances. I therefore grant final orders as follows;
  1. Defendants counter-claim is hereby dismissed.
  2. Plaintiff's claim is allowed as follows:
    - a. An order is hereby issued for the removal of the restriction placed against the Plaintiff's title for land parcel No Abothuguchi/Kithirune/2264.
    - b. An order for a permanent injunction is hereby issued against the defendants, their servants, agents, employee, assignees and or anybody else acting on their behalf from



entering and or interfering in anyway with plaintiff's land parcel No Abothuguchi/  
Kithirune/2264.

3. The defendants (excluding 1<sup>st</sup> defendant who is alleged to be deceased) are condemned to pay the costs the suit.

**DATED AND SIGNED AT NAIROBI THIS 5<sup>TH</sup> DAY OF MAY, 2022.**

**LUCY N MBUGUA**

**JUDGE**

**DELIVERED AT MERU THIS 18<sup>TH</sup> DAY OF MAY, 2022.**

**HON CK NZILI**

.....

**JUDGE**

**In the presence of:-**

Mageria Nyaga for the Plaintiff.

Mukaburu for the Defendants.

Court Assistant:

