



REPUBLIC OF KENYA



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**M'Ringer v M'Ikwina (Environment & Land Case 66 of 2019)
[2022] KEELC 3623 (KLR) (11 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3623 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 66 OF 2019**

CK NZILI, J

MAY 11, 2022

BETWEEN

SUSAN KATHAMBI KINOTI M'RINGERA APPLICANT

AND

MISHECK M'RINGERA M'IKWINGA RESPONDENT

JUDGMENT

A. Pleadings

1. The plaintiff has moved the court through an originating summons dated November 26, 2019 seeking the court to answer the following questions; if she was in possession of 2 ½ acres comprising of LR No Kibirichia/Kibirichia/218 by way of adverse possession for over 38 years without interruption by anyone; if the defendant was in breach of trust for failing to transfer 2 ½ acres to the plaintiff by virtue of a clan agreement; whether the plaintiff was entitled to a subdivision of the suit land for 2 ½ acres and a transfer of the same to her name; whether the plaintiff will suffer irreparable loss and damage if she was deprived of 2 ½ acres which she has been occupying and has developed for more than 38 years; and whether her name can be registered.
2. The plaintiff's prayers were -(a) declaration that she has been in occupation of 2 ½ acres of LR No Kibirichia/Kibirichia/3124 by adverse possession and (b) the Executive Officer of the court to be empowered to sign all documents for 2 ½ acres out of L.R Kibirichia/Kibirichia/3124 and transfer the same to the plaintiff. By sworn affidavit of the even dates, the plaintiff has deposed that the 2 ½ acres she has been occupying for 38 years had not been transferred to her deceased husband though the land control board had approved the transfer in 1998 that the defendant has failed to date to effect the transfer which was in breach of trust, actuated by malice and contempt for rules of natural justice.
3. The application was also supported by a list of documents dated November 8, 2019 among the documents being the transfer forms, mutation forms and an application for the land control board for the transfer.



4. The plaintiff also filed a supplementary affidavit on February 19, 2020 and attached a clan elders minutes and a receipt of payment to the land control board dated August 3, 1998. Further she filed a further list of exhibits dated 22.10.2020 attaching photographs.
5. The application was opposed by an affidavit of Meshack M'Ringer M'Ikwina the defendant sworn on January 15, 2020 stating that he did not own or know the alleged owner of parcel No 3124. Similarly, the defendant stated he was not aware of the alleged land control board forms, mutation forms and a letter of consent to transfer attached to the supporting affidavit by the plaintiff.
6. Additionally, the defendant averred he had no interest over the alleged suit land and that his land was initially LR No Kibirichia/Kibirichia/218 which he had subdivided and shared out to his children, the plaintiff as her daughter in law included, which was never ancestral land capable of being claimed under any customary trust by the plaintiff.
7. The defendant averred that the plaintiff had been previously filed multiple claims against him starting with Meru ELC No 101 of 2010 which she later withdrew and was ordered to pay him costs. The second case filed was against his son Gideon Muriuki namely Meru CMC ELC No 11 of 2011 which was dismissed. The defendant averred the plaintiff was actuated by greed deep hatred towards him and her claims were malicious and an abuse of the court process.
8. The defendant averred the plaintiff kept on changing her claims in all the previous suits but was now alleging that she was given 2.5 acres which clearly shows that she is untruthful.
9. Further, the defendant averred he had made it clear to all his children that he would give each one of them, the plaintiff included 1.00 acres and the balance of the original land would remain under his name, some of which subdivisions he had effected upon payment of survey fees. He averred that he was always ready and willing to transfer to the plaintiff her portion of land where she had built her homestead with his consent, could not possibly claim an adverse possession. The defendant attached to his affidavit the plaint in Meru HCC No 101 of 2010, a certificate of costs dated 26.6.2018 and a judgment in Meru CMCC No 11 of 2018 as annexures marked MM 1-MM III respectively.
10. Similarly the defendant filed a notice of preliminary objection dated 10.3.2020 on the grounds that the court lacked jurisdiction under Section 7 *Civil Procedure Act* and that the suit was res judicata, incompetent bad in law and an abuse of the court process having been conclusively determined in Meru CMCC ELC No 11 of 2018.

B. Pre-trial compliance

11. In compliance with Order II Civil Procedure Rules the plaintiff filed a list of witnesses dated November 23, 2021, attaching also documents namely; clan elders minutes, copy of official search for L.R 4170, case summary, issues for determination, pretrial questionnaire, limited grant of administration ad litem and a death certificate. On his part the defendant filed a paginated bundle of documents dated December 2, 2021 containing the list of witnesses, witness statements list of documents, decree in Meru CMCC No 11 of 2018, judgment in CMCC 11 of 2018, green cards for L.R Kibirichia/Kibirichia 218, 3124, 4170, ruling in Meru ELCC No 101 of 2010, copy of OB No 13/16/7/2020 from Subuiga Police station and an amended plaint in Meru HC ELC No 101 of 2010 dated 14.6.2011

C. Testimony

12. The plaintiff adopted her supporting affidavit to the originating summons and her supplementary supporting affidavit filed on February 19, 2020. Similarly she produced as exhibits documents contained in the list of documents dated November 8, 2019 and October 22, 2020 namely a letter of



- consent dated September 2, 1998 as P Exh 1, an application for land control board consent P Exh (2), Mutation form P Exh (3), Photos P Exh (4) (a) – (e), search certificate as P Exh (6), limited grant as P Exh (7) and copy of death certificate as P Exh (8).
13. According to her she insisted her late husband had been given Parcel No 3124 by the defendant where they had built their homestead but were currently on parcel No 4169.
 14. In cross examination, the plaintiff admitted that the defendant was her father in law and she was currently living on the land where her late husband was shown to occupy as part of his share among the five sons of the defendant.
 15. Further, PW 1 confirmed that a surveyor had come to the suit land and erected some beacons for portions for each of the sons of the defendant according to where each of them had been shown to occupy which parcel of land according to her was approximately 15 acres.
 16. Shown the defendant's list of documents dated December 2, 2021, the plaintiff confirmed documents listed as number 7 was the green card for LR No 218 the original parcel number indicating the land was approximately 14 acres or 5.67 ha, but the title indicated it was closed for subdivisions in 2018.
 17. Further, PW 1 indicated document No 4 in the defendants list of documents was a green card for L.R 3124 as registered in the name of M'Nganotha M'Mukindia which was a subdivision of P. No 243. She insisted she did not want the land for the said M'Nganotha M'Mukindia.
 18. Asked about the previous suits, the plaintiff confirmed the existence of the previous suits at the Chief Magistrate's Court which was dismissed on 30.10.2019 as well as the High Court Case No 101 of 2010 at page 20-24.
 19. Regarding the search for the land she was seeking for declaratory orders against the plaintiff insisted it belonged to the defendant even though she had not undertaken a current search for the same. Further PW 1 admitted the original Parcel No 218 had been subdivided into eight titles including 4163 – 4170 though she could not tell where Parcel No 3124 had come from.
 20. Regarding P Exh 3 PW 1 confirmed it lacked essential feature such as the date signature and the time the surveyor visited the land.
 21. PW 1 denied that the defendant had offered to give each of his children one acre of his land which in any event she was not willing to accept since according to her each the children had 2½ acres and not one acre as alleged.
 22. Additionally PW 1 testified that the defendant had shared out his land and was left with three acres. She denied that she was demanding more than the other children though it was his right to share his land to his children according to his wishes.
 23. DW 1 adopted his witness statement dated December 2, 2021 as his evidence in chief and produced as exhibits documents contained in his list of documents dated December 2, 2021 from page 7-27 of his paginated bundle. The exhibit were decree in Meru Cm ELC No 11 of 2018, (D. Exh 1), Judgment thereof (D. Exh 2), copy of record for LR No 218 as (D. Exh 3), copy of record as (D. Exh 4), copy of record for parcel No 4170 (D. Exh 5), ruling in HC No 101 of 2010 as (D. Exh 6), OB entry as (D. Exh 7) and amended plaint in HCC No 101 of 2010 as (D. Exh 8) respectivel.
 24. In cross examination, the defendant said he was the one who had authorized the plaintiff to erect a homestead in her current portion an acre each in accordance with boundaries for each of his ten children out of the 13 acres. He was categorical that the plaintiff was using force to interfere with the



erected boundaries (beacons). The defendant admitted the plaintiff had placed a caution on one of his parcels for no good reasons.

25. In re-examination, the defendant indicated he was always willing to transfer one acre to the plaintiff despite her removing the erected beacons.
26. DW 2 adopted his witness statement dated December 2, 2021 as his evidence in chief and confirmed that D. Exh 5 was under his name measuring approximately one acre which was a subdivision of Parcel No 218 initially owned by the defendant.
27. As the elder son of the defendant D.W 2 he confirmed that he was brought up on the suit land though he had moved to other homesteads elsewhere. He insisted that the plaintiff had been disputing the sub divisions as directed by the defendant who had already decided on how to share his land among his five boys and five girls.
28. In his view, the plaintiff was demanding for more land than the rest of the children which would be unfair.

D. Written Submissions

29. The plaintiff submitted that her P Exh 1-3 were clear a request for sub division by her late husband and the defendant resulted into sub-divisions no's 3120, 3121, 3123, 3124, 3125, 3126, 3127 and 3128 out of the Parcel No 218 subsequent to which her late husband applied for a transfer of Parcel No 3134 which was consented to by the defendant. Further she submitted that the land officers changed the said numbers into Parcel Nos. 463, 4164, 4165, 4166, 4167, 4168, 4169 and 4170 as per her attached documents marked SKKMM (IV) to the written submissions dated March 16, 2022.
30. The plaintiff submitted that he attached documents were clear how the land transaction changed hands and that her late husband should have been transferred Parcel No 4169 as per the diagram map, hence she was entitled to the orders sought.
31. On the other hand on the defendant by submission dated March 29, 2022, stated that given the evidence tendered by both sides and applying the law obtaining an adverse possession, the plaintiffs case must fail since the respondent was not the registered owner of Parcel No 3124 and the registered owner as per the green card was not a party to this suit. Further, the defendant submitted the case must also fail as to uncertainty on which part of land the plaintiff was claiming in view of her pleadings and testimony in court.
32. The defendant submitted that even if the court was to proceed on the basis of the resultant titles, the court would be engaging in a guess work or an exercise in futility to establish where the plaintiff resides without any clear proof.
33. The defendant submitted the plaintiff's late husband entered into the land with the permission and consent of the defendant by virtue of a fiduciary relationship. Therefore, it was submitted that the entry and use of the father's land by his children could not be adverse to the defendant. Reliance was placed on *Wanje vs Saikwa* (1984) KLR 284.
34. As to whether children can claim adverse possession the defendant relied on *Alice Wamugo Nyaga & 3 others vs Cheleste Mbogo Njeru* (2019) eKLR on the proposition that children reside on the land with the parents' consent during his lifetime. The position also obtained in *Stima vs Cherongo* (2002) 2 KLR 84 and *David Kipkoech Kogo vs Esther Chesaina Bedford* (2016 eKLR).
35. The court was also invited to take judicial notice of the cruelty and mistreatment the plaintiff has visited to the defendant who was elderly and has tried to use force to get her wish and that in spite of all this,



was still willing to give her a part of his land. The court was therefore asked to find the suit misconceived and reject it with costs.

E. Issues for Determination

36. The issues commending themselves for the court's determination are:
- i. If the plaintiffs claim is res judicata and an abuse of the court process
 - ii. If the plaintiff has made out a case for adverse possession for 2 ½ acres out of LR No 218 and 3124.
 - iii. If the defendant has breached a trust by failing to transfer 2 ½ acres of LR No 3124 to the plaintiff.

F. Determination

37. The plaintiff has anchored her claims on both adverse possession and breach of a customary trust. She has also pleaded and testified that the defendant had initiated a subdivision process while her late husband was alive going by her P Exh 1-3 for 2 ½ acres but was now allegedly changing to give her only one acre yet there had been an approved consent to transfer the 2 ½ acres of land.
38. Further the plaintiff has produced clan minutes in which she alleged the defendant consented to the sharing of his land in terms of the two and half acres before a clan meeting though she called no clan official to produce them.
39. On the other hand, the defendant has pleaded and testified that her herein claim was res judicata and an abuse of court since the issues were determined by competent courts and no appeal had been preferred against the said decisions.
40. Further, the defendant has pleaded and testified that the plaintiff has untruthful and kept on changing her claims from two and half acres, to one acre hence the claim was inconsistent going by D. Exhs 1, 2, 6 & 8.
41. D. Exh No 6 indicates the said suit was withdrawn with costs while the claim in D. Exh 2 appears to have been targeted over the review of the subdivision to ensure that the plaintiff was allocated at the place where she had developed. The court found nothing unlawful about the said sub divisions by the defendant herein.
42. Section 7 of the *Civil Procedure Act* relates to issues in which are similar in the two suits and where the previous suit was determined by a competent court to finality.
43. Section 28 of the *Environment and Land Court Act* bars this court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction.
44. In *IEBC vs Maina Kiai & 5 others* 2017 eKLR the court held a party raising res judicata must demonstrate that the suit was directly and subsequently in issue in the former suit; the former suit was between the same parties under whom they or any of their claim, they were litigating under the same title, the issue was finally determined in the former suit and that the court that formerly heard and determined the suit was competent to try the subsequent suit or the suit in which the issue is raised.
45. Applying the above principles to the instant suit, I do not think the former suits touched on the issue of adverse possession and customary trust and were determined to finality such issues.



46. In Edwin Thuo vs AG & another Petition No 212 of 2012, the court held it must be vigilant and guard against a party evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court in another way which has been resolved by a court of competent jurisdiction. See also [Kenya Hotel Properties Ltd vs Willesden Investments Ltd and 4 others](#) (2013) eKLR.
47. In [Abraham Adams Gina \(Suing on behalf of Geoffrey Adams Ogwa vs Geoffrey Ogaba Namadoa](#) (2022) eKLR, the court held adverse possession accrues by operation of law where the main issue is that the defendants title has been extinguished and that the inclusion of the two claims in one suit would have been contradictory.
48. In this suit, I taken the view the previous suit were not based on adverse possession or customary trust. The onus was on the defendant to prove the issues herein have been heard and determined to finality. This court has not been availed any decree (s) where the two issues were heard and determined to finality. Therefore the defence of *res judicata* and abuse of the court process is hereby rejected.
49. For a party to plead and prove adverse possession, he or she must prove possession was adequate for 12 years, in continuity, in publicity and in extent and that it was adverse to the registered owner(s). See [Maweu vs Kiv Ranching & Farming cooperative society](#) (1985) KLR 430.
50. In this suit the plaintiff seeks adverse possession over LR No 218 and breach of trust in LR No 3124. There was no search attached to the originating summon for the two parcel of land P Exh 3 indicates that Parcel No 218 was initially registered in the name of the defendant was closed for subdivision on January 5, 2010 while D Exh 4 indicates Parcel No 3124 was opened on 12.8.98 and belonged to Joshua Mwongera Stephen as at April 25, 2002 and was subsequently sold and transferred to M'Ngoatha M' Mukindia .
51. Section 38 of the [Limitations of Actions Act](#) requires suit to be filed for adverse possession against the registered owner of the suit land. The defendant has pleaded and denied ownership of the two parcels both in his replying affidavit and under oath in court. He has testified that he has shared and subdivided his original Parcel No 218 to his ten children among them the plaintiff who has rejected the sub divisions.
52. The court in Meru CMCC No 11 of 2018 found as a matter of law and fact the said subdivisions were lawful and in accordance with the defendants wishes and legal rights.
53. At the time the plaintiff filed this suit the decree in the Meru CM CC No 11 of 2018 suit was already out slightly over a month before. The plaintiff therefore knew that LR No 218 was no longer in existence.
54. D Exh 2 at page 9 of the paginated bundle indicates the plaintiff testified in Meru CMCC No 11 of 2018 that her developed portion was imposed with Parcel No 4969 and 4170. In that case she produced search certificate for LR No Kibirichia/Kibirichia/4170 and 4169 and a Registry Index Map and minutes dated November 21, 2009 as exhibits before that court.
55. The defendant at page 10 of his paginated bundle confirmed those subdivisions including the fact that her homestead fell on Parcel No 4169 to which he has said intended to further subdivide in order to give the plaintiff one acre so that her homestead and her husband's grave could form part of the said one acre.
56. In this suit the plaintiff has not brought any documentary evidence to contradict those facts. She cannot therefore sustain a suit against a non-existent Parcel No 218 and again Parcel No 3124 which as per Exh. 4 does not belong to the defendant but one M'Nganotha M'Mukindia who is not a party to this suit.



57. Under Order 37 Rule 7 *Civil Procedure Rules*, the plaintiff had the burden to produce a verified extract of ownership showing the nexus between the defendant and the two parcels of land. My finding is that the plaintiff has failed to prove any adverse possession against the defendant.
58. In *Wanje vs Saikwa* (supra), *Alice Wamugo Nyaga* (supra), *Stima vs Cherongo* (supra), *David Kipkoech Kogo* (supra) and *Mbui Mukangu vs Gerald Mutwiri Mbui* (2004) eKLR the golden thread is that children do occupy parents land out of consent and parents cannot be compelled to share out land without their consent to offspring especially during their lifetime.
59. The plaintiff was under an obligation to lead evidence on any intergenerational equity where the land is held by one generation for the benefit of the succeeding generation.
60. The issue of possession and occupation was not disputed by both parties. The defendant has expressed his willingness to give his land to all his children as it pleases him but in an equitable manner. The plaintiff has not lead any evidence that the defendant has been unreasonable or was taking away her land. Incidentally, DW 1 and DW 2 have confirmed that it was the plaintiff who is being unreasonable and using force to take more than the rest of the children of the defendant. I therefore find the plaintiff has failed to prove any trust which has been breached by the defendant.
61. Given the circumstances, I find the plaintiff has failed to prove her case to the required standard. The same is dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 11TH DAY OF MAY, 2022

In presence of:

Miss Mbogo for plaintiff

Plaintiff

HON. C.K. NZILI

ELC JUDGE

