



REPUBLIC OF KENYA



KENYA LAW
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Muiruri & 6 others v Murigi & 4 others (Environment & Land Case E034 of 2021) [2022] KEELC 2487 (KLR) (14 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2487 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E034 OF 2021**

LN GACHERU, J

JULY 14, 2022

BETWEEN

PETER MUNGAI MUIRURI 1ST PLAINTIFF
PHYLIS NYAGUTHIE MURIMI 2ND PLAINTIFF
JANE WANJIRU MUIRURI 3RD PLAINTIFF
VICTORIA MWIHAKI MATHEKA 4TH PLAINTIFF
JOHN NDUNG’U MUIRURI 5TH PLAINTIFF
JOHN KARURI 6TH PLAINTIFF
JOYCE NJOKI IRUNGU 7TH PLAINTIFF

AND

HERMAN KUNG’U MURIGI 1ST DEFENDANT
FLORENCE WAIRIMU MURIGI 2ND DEFENDANT
BERNARD MUUIRURI MURIGI 3RD DEFENDANT
MATHEW MURIGI NDUNG’U 4TH DEFENDANT
NANCY WAMBUI MURIGI 5TH DEFENDANT

JUDGMENT

1. The Plaintiffs moved this Court vide a Complaint dated 2nd November 2021, and filed on the 3rd November 2021, wherein they sought for Judgment against the Defendants herein jointly and severally for:
 - a) A declaration that the Defendants’ father held the suit land parcel number Makuyu/ Makuyu/ Block 1/921, in trust for himself and his siblings



- b) A declaration that the Plaintiffs are entitled by way of adverse possession having occupied Makuyu/ Makuyu/ BlocK 1/921, for a period exceeding 12 years
 - c) Costs of the suit and interest thereof
 - d) Any other or better relief this Honorable Court may deem fit to grant
2. It is the Plaintiffs averment that the Defendants are the children of Moses Murigi Muiruri, deceased, who was the registered proprietor of the suit property and a brother of the Plaintiffs. It is their case that their mother Eunice Wambui, bought the suit property and due to the existing customs, then the land had to be registered in the name of their elder brother Moses Murigi, who was to hold it in trust for himself and his siblings. That the Defendants took out Letters of Administration over the estate of Moses Murigi and included the suit property as properties forming part of the estate of the deceased. Further, that the plaintiffs have been in occupation of the suit land since 1979, and which occupation has been with the knowledge of the Defendants, who have never challenged their possession. Additionally, that they have developed thereon and even interred their kins on the suit property and are therefore entitled to the suit land by dint of trust.
 3. The Defendants entered appearance and filed a Memorandum of Appearance dated 22nd November, 2021. Subsequently they instructed the Law Firm of P N Morigori and Company Advocates who filed a Notice of Appointment of Advocates dated 8th December, 2021. Despite entering appearance, the Defendants did not file any Defence prompting, the Plaintiffs to file a Request for Judgment which was endorsed by the Court on 10th January, 2022. The matter was set down for Formal Proof and the Defendants were issued with a Hearing Notice through their advocates. The said Notice was received and acknowledged by stamping and an Affidavit of Service was duly filed in Court as required by law.
 4. At the hearing, four witnesses testified.

PW1 Peter Mungai Muiruri, adopted his witness statement dated 2nd November, 2021 and produced the list of documents as exhibits. He stated that the plaintiffs have lived on the suit property for over forty years and that at the time the land was acquired, their mother did not have an identity card leading, to the land being registered in the name of the deceased. He further told the Court that the plaintiffs have lived on the suit property without any interference until 2020, when the Defendants poured building material on the suit property. He urged this Court to allow their claim.

PW2: Phylis Nyaguthie, testified that she has lived on the suit property for over forty years and that some of their relatives have been buried thereon, and are thus the plaintiffs are entitled to a share of the suit land.

PW3 John Karuri; testified that the land was bought by their mother Eunice, but was registered in the name of their first born brother Moses Murigi because their mother did not have an ID. He reiterated the evidence of PW1 and PW2, on when the Defendants gained ingress into the suit land.

PW4 Peter Njoroge Muiruri, adopted his witness statement and reiterated the foregoing evidence.
 5. The Plaintiffs filed their written submissions dated 27th May, 2022 and reiterated their testimonies and attached a copy of a title deed and raised two issues for determination by this Court.
 6. On customary trust, the Plaintiffs submitted that customary trust is an overriding interest on land, which does not need to be expressly stated in the title deed as provided under Section 28 of the Registered *Land Act*. Additionally, that they have led evidence as required by the Court in the case of *Njenga Chogera vs Maria Wanjiru Kimani and 2 Others*, (2005) eLKR where the Court held that a party claiming customary trust must lead evidence on the history of the suit property and the custom



therein. Further that they established that they have been in physical possession of the land as was held in the case of *Mbui Mukanga vs General Mutwiri Mbui*. CA No.281 of 2000.

7. On adverse possession, the Plaintiffs submitted that they have satisfied the principles for grant of the orders as was enunciated in the case of *James Mwangi and Another vs Mukinye Enterprises Ltd. Nairobi HCCC NO 3912 OF 1986*: To buttress their claim for adverse possession, the Plaintiffs submitted that while some plaintiffs have set up permanent houses, some have been doing farming on the suit property. In the end, they invited this Court to find that they have established the principles for grant of orders of adverse possession as was established in the case of *Kasuve vs Mwaani Investmet Limited & 4 others/KLR 184*

Analysis and Determination

8. A perusal of the pleadings and analysis of evidence informs this Court that the Plaintiffs are siblings of the later Moses Murigi Muiruri, while the Defendants are biological children of the deceased. This Court also notes from the attached title deed that the suit land is registered in the name of Moses Murigi Muiruri, Deceased. While it is not in dispute that the Defendants are children of the deceased, this Court notes and appreciates that there is no evidence that the land has been transmitted to them. It is also not clear to this Court whether Letters of Administration have been issued, and to which beneficiary, the suit land has been transmitted, to, save for alleging that the suit land was included in the Succession Cause for the deceased's estate. No evidence in the form of a grant or pleading in the Succession Court was availed. This begs the question whether the Defendants are competent parties for this suit.

9. It is trite that orders of the Court cannot be issued in vain and once granted, such orders must be capable of being enforced. Section 82(a) of the [Law of Succession Act](#) offers guidance on what happens to causes of action vested on a deceased person. It provides as follows:

82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- (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;

10. What the foregoing section requires therefore is that suits touching and/ or for a deceased person be instituted against and/ or by the Personal Representatives, who shall have powers as per the grant issued. Presently, the Defendants have been sued in their capacity as beneficiaries of the Estate of Moses Murigi. This raises the cardinal issue whether the Defendants have the **locus standi** to be sued.

11. The issue of locus standi was well enunciated in the case of [Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva \(Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased\)](#) [2016] eKLR where the Court held:

Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of court acting without jurisdiction since it all 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.”

12. This Court is well guided by the above pronouncement and noting that there was no material evidence placed before this Court to show that distribution of the Estate of Moses Murigi has been done and/or concluded, this Court cannot exercise leniency on the part of the Plaintiffs. While their testimony is not controverted, they had the duty to avail sufficient evidence to this Court. The Court too has a duty to interrogate and evaluate the uncontroverted evidence in order to determine whether the Plaintiffs are entitled to the prayers sought.
13. This Court has pronounced itself on uncontroverted evidence in Murang’a ELCA No. 16 of 2017 *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, on the strength that it is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must proof his case, however much the opponent has not made a presence in the contest. This Court is in the same agreement with the wordings of Justice Mulwa in Nakuru Civil Appeal No 110 of 2013;- *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR, where the court opined;-

I am of the considered view that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted”.

14. The Plaintiffs testified that they are in occupation of the suit property and that the Defendants attempted to take occupation by depositing building materials on the suit land. While this is an issue that can easily be proven by production of photographic evidence, the Plaintiffs opted not to. Our Courts are Courts of evidence, and the Plaintiffs were bound to lead such evidence. This Court would have been well guided by the holding of the Court of Appeal in Mombasa Civil Appeal No. 48 of 2018 *Peter Kim Baker & 2 others vs Sidi Katana Bongo & another* [2019] eKLR, where the learned judges opined that the appellants did not need Letters of Administration to defend their right to occupation. Unlike in the foregoing suit, the Plaintiffs herein have not proven occupation.
15. To this end, this Court finds and holds that the Defendants are not parties capable of being sued and they therefore lack the **locus standi** to defend the suit. Therefore, this Court finds that it has no option but to strike out this suit.
16. Having carefully considered the available evidence, the Court finds and holds that there is no evidence that the Defendants herein are parties who are capable of being sued and have capacities or locus standi.
17. Consequently, the Court finds that the Plaintiffs suit herein is incompetent and the said suit is hereby struck out entirely with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 14TH DAY OF JULY, 2022.

L. GACHERU

JUDGE

In the presence of; -

Jeol Njonjo – Court Assistant

N/A for the Plaintiff



N/A for the Defendants

L. GACHERU

JUDGE

