



Mbaria (Suing as the Administrator of the Estate of Mbaria Ndere - Deceased) v Muraguri (Suing as the Administrator of the Estate of Muraguri Murathu - Deceased) (Environmental and Land Originating Summons 6 of 2020) [2022] KEELC 13266 (KLR) (6 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13266 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 6 OF 2020
LN GACHERU, J
OCTOBER 6, 2022**

BETWEEN

**WILSON GIOCHE MBARIA PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF MBARIA NDERE -
DECEASED**

AND

**JAMES MURATHU MURAGURI DEFENDANT
SUING AS THE ADMINISTRATOR OF THE ESTATE OF MURAGURI
MURATHU - DECEASED**

JUDGMENT

1. Through an Originating Summons dated 19th May 2020, the Plaintiff herein sought for the following orders against the Defendant herein;
 - a. That the Plaintiff suing on behalf of the estate of Mbaria Ndere, be registered as the proprietor of all that parcel of land known as L.R LOC 19/ Gacharageini/735, measuring 14.3 Acres or thereabout having acquired the same pursuant to Section 38 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
 - b. That the Defendant, being the Administrator of the estate of MURAGURI MURATHU, the registered owner of L.R LOC 19/Gacharageini/735, be ordered to transfer the same to the Plaintiff, as it had been extinguished through Adverse Possession.
 - c. That the Plaintiff be registered as the absolute proprietor of L.R LOC 19/Gacharageini/735.
 - d. That the Deputy Registrar of this Court, be directed to sign all those documents and/or applications on behalf of the Defendant to facilitate the transfer of the aforesaid land to the



Plaintiff or in the alternative the District Land Registrar, Murang'a be ordered to cancel the said title, and register it in the name of Wilson Gioche Mbaria.

- e. That the Defendant be ordered to bear costs of this Originating Summons.
2. The Originating Summons is not premised on any grounds, but is based on the Supporting Affidavit of the Plaintiff herein sworn on May 19, 2020, and the annexures thereto. It is the Plaintiff's contention that the Defendant herein has been sued in his capacity as Legal Representative of the estate of Muraguri Murathu pursuant to Grant of Letters of Administration intestate dated January 10, 2012. That during the lifetime of his deceased father, the Defendant's father (deceased) sold to him the entire L.R LOC 19/Gacharageini/735, as evidenced from the various documents presented. That pursuant to the said sale, his father together with his family was put in vacant possession of the suit land. That his late father extensively developed the suit land by planting 1200 tea bushes, planting avocado trees, gum trees, and cypress trees, as well as building structures. That his late father and sister are both buried on the suit land. That his extended family and himself have been in open occupation, use and possession of the suit land since 1970, and the Defendant or his extended family has never in any way whatsoever interrupted their possession, use and occupation. That in the circumstances, the Court should allow his claim for adverse possession.
3. The Defendant opposed the instant Originating Summons via Replying Affidavit dated August 17, 2020. It is the Defendant's disposition that the suit herein is defective and does not disclose any cause of action against him. That he learnt from the elders of his clan that when Muraguri Murathu was leaving for Rift Valley around 1964, he requested Wanjiru Ndere, to take care of his land, but did not sell it to her or to Mbaria Ndere. He denied all the allegations made by the Plaintiff and urged this Court to dismiss the Plaintiff's claim with costs.

PLAINTIFF'S CASE

4. PW 1 Wilson Gioche Mbaire, adopted his Supporting Affidavit dated 19th May 2020, and his Witness Statement dated November 19, 2020, as his evidence. He also produced the documents attached to the Summons, the list of documents dated October 21, 2020, and further list of documents dated November 19, 2020, as Exhibits in Court. He stated that he was born in 1969, on the suit land and that he grew up there. That his father Mbaria Ndere (deceased), had four children. With the first being born in 1962, and the last in 1969. That all the four children were born and raised on the suit land. That the family of Muraguri Muratha, has never lived on the suit land and that they had settled in Nyandarua County. That the late Mbaria Ndere was buried on the suit land.
5. Further, that they had planted various crops thereon, built houses and installed both water and electricity. That the land was first demarcated in 1964, and their father had moved to the suit land from the colonial camps. That neither the Defendant's father nor the Defendant himself had attempted at any time whatsoever to evict them. That part of his family was still living on the suit land todate, and they had indeed become adverse to the suit land.
6. On cross examination, he stated that on November 7, 2011, his father paid the balance of purchase price, of Kshs. 4000/=. That the Kshs. 500/= outstanding was not part of the purchase price, but was for tea of the elders. That the delay in filing this suit was caused by the Covid 19 pandemic, during which time the Courts were not operating.
7. PW 2 Francis Karimiri Kamagara testified that he knew the Plaintiff and was aware of the instant suit. He adopted his witness statement dated November 19, 2020, as his evidence in chief.



8. On cross examination, he testified that he knew both the late Mbaria Ndere and the late Muraguri Murathu. That he attended the land demarcation and that Mbaria was taking care of Muraguri's land. That Mbaria's mother Wanjiru Ndere is the one who initially had the responsibility of taking care of Muraguri's land, but it is Mbaria Ndere who took the responsibility of consolidating the said land. That the late Mbaria asked him to accompany him to Nyandarua County where Muraguri lived to discuss the suit land, and it was agreed that the land should be transferred to Mbaria Ndere.
9. Further that he witnessed the balance of Ksh. 4000/= being paid to the Muraguri's family at the chief's camp. That there was a balance of Kshs.500/= and he did not know when the same would be paid.
10. PW 3 Samuel Gichohi, testified that he knew the Plaintiff herein and he also knew his late father Mbaria Ndere. That he knew the suit land, and that he had participated in its demarcation in 1963. That the late Mbaria Ndere lived on the suit land, with his mother and his children were born and raised there. That he also knew Muraguri and he lived in Nyandarua County even before demarcation. He adopted his witness statement dated November 19, 2020, as part of his evidence in chief.
11. PW 4 Dismus Mbaria Ithebu, testified that he knew the Plaintiff herein and he also knew his father Mbaria Ndere and they belonged to the same clan. That the family of Mbaria Ndere has lived on the suit land since the land was demarcated in 1963. That he was a neighbour to the Plaintiff and a village elder, and he knew the suit land. He adopted his witness statement dated 19th November 2020, as his evidence in chief.
12. PW 5 Dorcas Wanjiru Mbaaria, adopted her witness statement dated November 19, 2020, and testified that the Plaintiff was his brother and they were both brought up on the suit land, which was registered in the name of Muraguri Murathu (deceased). That their grandmother Dorcas Wanjiru died in 1982, and she was buried on the suit land. That their father also died in 2016, and he was also buried on the suit land. That their sister was also buried there in 1989 and they have planted various crops as well.
13. Further that his father bought the suit land from Muraguri and the Plaintiff's family was living on the suit land to date. That the family of Mbaria Ndere as lived on the suit land since it was demarcated in 1963.

DEFENCE CASE

14. DW 1 James Murathu Muraguri adopted his Replying Affidavit dated August 19, 2020, his Further Affidavit dated January 21, 2021, together with documents attached therein and witness statement dated October 14, 2020, as part of his evidence in chief.
15. He testified that he filed Nakuru Succession Cause No.506 of 2011, and he was appointed the Legal Administrator of the Estate of Muraguri Murathu. That the Grant was Confirmed, but the Plaintiff herein filed an objection, and the said grant was later revoked. That since the said revocation, he had not filed another Succession Cause. That he knew the late Mbaria Ndere, and they were not related. That he used to meet the late Mbaria Ndere on the suit land whenever he accompanied his father to visit Wanjiru Ndere. That he knew the Plaintiff herein having met him in Nakuru.
16. On cross examination, he testified that his father died in 1982 and he was buried in a Cemetery in Mirangiini. That his mother Margaret Waithera also died sometime in 1990, and she was buried in the same Cemetery as his father. That both his parents were buried in the Cemetery, because they lacked the financial capability to transport their bodies to Gacharageini in Murang'a.
17. Further, that he had bought land in Mirangiini and that is where he lived. That he was told about the history of the suit land by his father and that he was a young boy when the suit land was consolidated



- and demarcated. That Wanjiru Ndere who was the mother of Mbaria Ndere occupied the suit land between 1964 and 1982. That his father never took any steps to evict the said Wanjiru Ndere. That he first visited the land in 1972, and he found Wanjiru Ndere and not the family of Mbaria Ndere. That during the said visit, he found that trees and tea bushes had been planted on the land and he assumed it was his father who had planted them.
18. In addition, after the demise of his father in 1982, he did not take any steps to acquire the suit land. That he received Kshs. 4000/=, from the family of Mbairi Ndere, but it was to cater for the tea and a balance of Kshs. 500/= was left. That there was a meeting held in Sabugo and nothing was agreed in that meeting. That he was forced to sign the agreement in 2010. That there was no valid sale agreement between his father and the late Mbaria Ndere. That the Plaintiff was on the suit land illegally, but neither him nor his father had taken any steps to evict him. That save for the Succession Cause, he had not filed any other suit to evict the Plaintiff.
 19. DW 2 Timothy Ikua Wanderi, testified that he knew the Plaintiff and the late Mbaria Ndere. That he also knew the late Muraguri Murathu and the suit land. He proceeded to adopt his witness statement dated October 14, 2020, as part of his evidence.
 20. That Muraguri Murathu gave Wanjiru Ndere, the suit land to take care of it. That the Plaintiff built his house 2017, but he did not know about the tea bushes. That Muraguri Murathu gave Wanjiru Ndere some tea bushes to sell, for him but Mbaria's wife registered the said tea bushes in the name of Mbaria Ndere instead of Muraguri's name.
 21. On cross examination, he testified that in 1963, he was 9 years old, and he heard that Muraguri Murathu left his land to Wanjiru Ndere. That he also heard that Muraguri had given Wanjiru Kshs. 300/= to purchase tea seedlings. That he asked Wanjiru Ndere about the Kshs. 300/= and she confirmed. That the tea bushes were to be registered in the name of Muraguri Murathu, but they were registered in the name of Mbaria Ndere. That the suit land was not occupied by Gioche and only the people who tend to the tea bushes live on the suit land.
 22. DW 3 Francis Maina Mwangi, adopted his witness statement dated October 14, 2020, as his evidence in chief.
 23. On cross examination, he testified that the late Muraguri Murathu, was his father in law and the Defendant is his brother in law. That he met both the Defendant and his father in Nyandarua County. That he had visited the suit land once on the invitation of the late Muraguri Murathu. That during the said visit, the late Mbaria Ndere was their host. That on the said visit, they did not find Wanjiru Ndere, but were told that the suit land belonged to the Muraguri Murathu.
 24. After the close of viva voce evidence, the parties filed and exchanged written submissions. The Plaintiff filed his written submissions dated May 24, 2022, through the Law Firm of Kirubi, Mwangi Ben & Co Advocates.
 25. In his submissions, the Plaintiff reiterated his case and urged the Court to find in his favour, as he had established a case for adverse possession against the Defendant. He further submitted that he has been in exclusive and uninterrupted occupation of the suit land as required by Section 17 of the Law of [Limitation of Actions Act](#).
 26. He invited this Court to find that he has become adverse to the land by dint of occupation for a period of over 12 years and relied on a litany of cases including the cases of [Francis Gacharu Kariri vs. Peter Njoroge Maire](#) Civil Appeal No.293 of 2002, the case of [Titus Kigoro Munyi vs. Peter Mburu Kimani](#) (2015) eKLR and the case of [Wainaina vs. Murai & Others](#) (1976) KLR 227 at page 231 where the Courts found that for a claim for adverse possession to issue, an Applicant must demonstrate that he



has been in occupation for over 12 years and also that he has occupied the land openly, without force, secrecy or license.

27. The Defendant on the other hand filed his written submissions dated June 7, 2022, through the Law Firm of Waiganjo Gichuki & Co Advocates. In his submissions, the Defendant discussed 3 main issues for determination by this Court.
28. On the issue of capacity to be sued, the Defendant submitted that he lacked capacity to be sued on behalf of the estate of Muraguri Murathu as the Grant he had been issued in Nakuru High Court Succession Cause 506 of 2011, had been revoked by the said Court on October 30, 2019, pursuant to an objection filed by the Plaintiff herein.
29. On whether the Plaintiff suit was properly before this Court, the Defendant submitted that the suit was filed outside time as the High Court in Nakuru High Court Succession Cause 506 of 2011, had ordered the Plaintiff to file a suit within 120 days from October 30, 2019. That the 120 days expired on February 26, 2020, and the instant suit was filed on May 20, 2020, way outside the timeline set by the Court. That the Plaintiff had not sought extension of time and therefore the instant suit was filed out of time.
30. On whether adverse possession had been proved, the Defendant submitted that Mbaria Ndere entered and stayed on the suit land on the strength of the permission given to his mother Wanjiru Ndere by Muraguri Murathu. That permissive possession can never give rise to adverse possession. He relied on the case of Wambugu vs Njugunab (1983) KLR 173, and the case of Richard Wefwafwa Songoi vs. Beb Munyifwa Songoi (2020) eKLR, where the Court held that entry with permission does not constitute adverse possession.
31. Further that time in adverse possession begins to count after payment of the last instalment and the Plaintiff had not adduced any evidence to show that he indeed paid the balance of Kshs. 500/= indicated in the document dated November 7, 2001. That time in adverse possession does not start to run where there is a sale agreement, unless the said sale agreement, is repudiated.
32. Based on the foregoing, the Defendant urged this Court to dismiss the Plaintiff's claim with costs.
33. The Court has carefully read and considered the pleadings, the evidence adduced, submissions, authorities cited and the relevant provisions of the law and finds that the issues for determination are
 - i. Whether the Defendant has capacity to be sued on behalf of the estate of Muraguri Murathu (deceased)
 - ii. Whether the instant suit is time barred
 - iii. Whether the Plaintiff has met the threshold for grant of orders for adverse possession over L.R LOC 19/Gacharageini/735



(i) Whether the Defendant has capacity to be sued on behalf of the estate of Muraguri Murathu (deceased)

34. The 1st issue for determination is whether the Defendant has locus to be sued on behalf of the estate of Muraguri Murathu (deceased). In the case of *Alfred Njau –Vs- City Council of Nairobi* [1983] KLR 625, the Court of Appeal, held *inter alia* that

“...Locus standi” literally means a place of standing and refers to the right to appear or be heard in Court or other proceedings and to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”

35. Time and again, Courts have held that where there is no locus the Court lacks jurisdiction. In the case of *Julian Adoyo Ongunga –vs- Francis Kiberenge Abano* Migori Civil Appeal No.119 of 2015, the Court had this to say on the issue of a party filing a suit without having obtained a limited grant.

“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 a 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.”

36. In the instant suit, the Plaintiff instituted the suit against the Defendant in his capacity as the Personal Representative to the estate of Muraguri Murathu (deceased). The Defendant on the other hand submitted that he lacked capacity to be sued as the Grant issued to him on October 10, 2012, was revoked by the High Court via an order issued on October 30, 2019.

37. A perusal of the said Grant dated October 10, 2012, indicates that it appointed the Defendant here in as the Personal Representative of the estate of Muraguri Murathu deceased. What then this Court should interpret is the effect of the Order of the Court issued on October 30, 2019, for revocation of grant.

38. Section 76 of the *Law of Succession Act* is very clear that: -

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the Court decides, either on application by any interested party or of its own motion... [Underlining mine]”

In *Re Estate of Joel Cheruiyot Ronoh* [2016] eKLR Musyoka J. stated as follows,

“A certificate of confirmation of a grant is not a grant of representation, but a certificate to the effect that the grant had been confirmed by the Court. The discretion given to the Court by the provisions in section 76 of the *Law of Succession Act* is for revocation of grants of representation, not certificates that confirm those grants. There is therefore no power in those provisions for the Court to revoke a certificate of confirmation of grant. ... It is important for the parties to differentiate between the character of a grant of representation and a certificate of confirmation of the grant. A grant is a Court order; it is a judicial pronouncement to the effect that some person has been appointed as administrator and granted the power to act as such. The certificate of confirmation of grant on the other



side merely certifies that orders have been made to confirm the grant. The certificate of confirmation of grant is not the order itself”

39. Based on the above, it is therefore correct for this Court to conclude that once a grant is revoked, the estate of a deceased person remains without a Personal Representative, and the onus lies on the beneficiaries of the said estate to petition the Court afresh for letter of administration. It follows therefore that after the Nakuru High Court revoked the Grant on October 30, 2019, the estate of Muraguri Murathu was left without a Personal Representative until a fresh Grant was to be obtained.
40. It is trite that a party retains a right to file suit against such party that they deem a right or relief exists or flows from. The Plaintiff argues that he has sued the Defendant because he was the Personal Representative of the estate Muraguri Murathu (deceased) in whose name the suit property was registered. The Defendant has contended as above and stated that he lacks capacity pursuant to a revocation of grant and that he is yet to take out a fresh grant for the estate of Muraguri Murathu (deceased).
41. The law of Succession protects property that is registered in the name of a deceased person. Section 45 of the said *Act* states that 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. It is the Court’s considered view that for any purpose includes also defence of a suit against the property of the deceased.
42. Suits against the estate of a deceased person should be brought by or against the Legal Representative of the estate.
43. Section 2 of the *Civil Procedure Act* defines a Legal Representative as a person who in, law represents the estate of a deceased person, and where a party sues or is sued in a representative character, being the person on whom the estate devolves upon the death of the party so suing or sued.
44. In this case, the Court’s attention has been drawn to the fact that the suit property vests in the estate of the deceased. The proper party to be sued would be the Personal Representative of the deceased owner. the provisions of Order 1 of *Civil Procedure Rules* cannot assist the Plaintiff herein as the sued party lacks legal persona in the circumstances of the case.
45. In the case of *Mohammed Abushin Mkullu –Vs- Suleiman Abdalla Hassan* (2012) EKLK, Ibrahim J (as he then was) held that, it is the duty of any party instituting a suit to find out which party they are filing claim against.
46. Further in the case of *Unilever Tea Kenya Ltd –Vs – National Land Commission & 2 Others* (2018) EKLK, the Court held that in order for a party to be joined as a Respondent, he must be a proper party. That the only reason which makes it necessary to join a party to an action is so that he should be bound by the result of the action.
47. From the foregoing, it is evident that an objection brought on the grounds of capacity to be sued goes to the root of the matter and indeed the jurisdiction of the Court. Where a party moves the Court in breach of this principle, the suit would be liable to be struck out summarily or deemed void abinitio.
48. It is the finding of this Court that the Defendant herein is not the right party to the suit or to be sued. The Defendant would be incapable of defending the claim in the absence of Letters of Grant of Administration of the estate of the late Muraguri Murathu.
49. Having found that the Defendant lacks locus to be sued on behalf of the estate of Muraguri Murathu, this Court sees no reason at all to proceed with the determination of the other issues outlined.



50. On the issue of costs, it is trite that costs shall follow the events. However, this Court takes cognisance of the fact that the instant suit has not been determined on merit owing to the fact that the wrong party had been sued on behalf of the estate of Muraguri Murathu (deceased). In the circumstances, this Court exercises its discretion and orders that each party should bear its own costs.
51. Having now analysed the issues as above and having considered the available evidence, the Court finds and holds that the Defendant herein lacks the locus standi to be sued which is a primary point of law and is almost similar to that of Jurisdiction. Therefore, lack of locus standi renders this suit incompetent.
52. For the above reasons, the Court proceeds to struck out the instant Originating Summons dated May 19, 2020, for being incompetent.
53. Each party to bear its own costs.
54. It is so ordered.

DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 6TH DAY OF OCTOBER, 2022.

L. GACHERU

JUDGE

In the presence of;-

Joel Njonjo - Court Assistant

Mr Mwangi Ben H/B Kirubi for the Plaintiff

Defendant - Absent

L. GACHERU

JUDGE

6/10/2022

