



**Mochoberi v Mochogwa (Environment & Land Case E003 of 2022)
[2022] KEELC 15005 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15005 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE E003 OF 2022**

JM KAMAU, J

NOVEMBER 24, 2022

BETWEEN

BENARD AUKA MOCHOBERI PLAINTIFF

AND

MARY NYANCHAMA MOCHOGWA DEFENDANT

RULING

1. This suit was commenced by an originating summons where the plaintiff sought for the following orders:
 1. A declaration that the defendant's rights to recover a portion of the Land known as LR West Mugirango/Bosamaro West/544 measuring 0.456 Ha is barred under the Limitations Of Actions Act, chapter 22 of Laws of Kenya, and her title thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of land for a period exceeding 12 years.
 2. There be an order that the plaintiff be registered as the proprietor of a portion of LR West Mugirango/Bosamaro West/544 measuring 0.456 Ha in place of the defendant who currently holds the title to the suit land.
 3. The portion measuring 0.456 Ha out of Land LR West Mugitango/ Bosamaro West/544 be sub-divided and the title in respect thereof be issued in favour of the plaintiff.
 4. There be a permanent order of injunction restraining the defendant either by herself, agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of the said portion of land measuring 0.456 Ha comprising of all the parcel of Land known as LR West Mugirango/Bosamaro West/544 in any manner whatsoever and/or howsoever.



5. The Deputy Registrar and/or the Executive Officer of this honourable court be directed and/or ordered to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of land measuring 0.456 Ha comprising the parcel of Land known as LR West Mugirango/Bosamaro West/544 in favour of the plaintiff, in the event of default by the defendant to execute the necessary transfer instruments.
 6. Costs of this originating summons be borne by the defendant.
 7. Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.
2. The grounds upon which the plaintiff anchors his prayers are:
- i. That on or about the November 17, 1976, the plaintiff's mother entered into a land sale agreement with Obaki Siango (Deceased), for a portion on Title No West Mugirango/Bosamaro/544 for a consideration of Kenya shillings six thousand (Kshs 6,000/=) only.
 - ii. That on the January 10, 1980, the plaintiff's mother entered into a land sale agreement with Auka Siango (Deceased) for a portion on Title No West Mugirango/Bosamaro/544 for a consideration of Kenya shillings five thousand (Kshs 5,000/=) only.
 - iii. That further on September 5, 1980, the plaintiff's mother entered into a land sale agreement with Morumbwa Siango, for a portion on title No West Mugirango/Bosamaro/544 for a consideration of Kenya shillings three thousand (Kshs 3,000/=) only.
 - iv. That equally on the February 24, 1981, the plaintiff's mother also entered into a land sale agreement with Onsarigo Siango (Deceased), for a portion on Title No West Mugirango/Bosamaro/544 for a consideration of Kenya shillings six thousand (Kshs 6,000/=) only and a cow.
 - v. That as at the time the plaintiff's mother purchased the portions on the suit parcel of land, the same was registered in the name of one Siango Nyaata who was the father to the vendors herein.
 - vi. That subsequently, sometime in the year 1997, One Charles Ondari Siango (Deceased) and brother to the vendors caused the entire suit parcel of land to be registered in his name.
 - vii. Nevertheless, the plaintiff had entered upon and commenced possession of the suit property in the year 1976, 1980 and 1981 immediately after his mother purchased the said portions.
 - viii. The plaintiff's occupation and possession of the suit property herein has been continuous and without interruption for a duration of over 46 years.
 - ix. Consequently, the defendant's rights to recover the portions of the suit property herein have been extinguished by effluxion of time.
 - x. The plaintiff proceeded to and fenced off the aforesaid portion of land and commenced various farming activities including planting maize, nappier grass, trees and rearing cows.
 - xi. Since acquiring the subject portion of land, the plaintiff has been utilizing the same peacefully and uninterrupted until sometime this year when the defendant sent an eviction notice to vacate from the parcel of land.
 - xii. Upon carrying out some due diligence, the plaintiff found out that the defendant had done succession in respect to the estate of Charles Ondari Siango (the husband to the defendant) and subsequently obtained a grant and got registered as the proprietor thereof.



- xiii. From the foregoing, it is thus evident that the defendant is keen and intent to deprive the plaintiff of the subject portion of land merely on an account of having been appointed as the administrator and personal representative of the estate of her late husband.
 - xiv. Owing to the continuous occupation of the plaintiff over the subject parcel of land, he had acquired prescriptive rights over the same by way of adverse possession and thus the defendant's rights to recover it as part of the estate of the late Charles Ondari Siango has been extinguished by effluxion of time.
 - xv. In the premises, the plaintiff's interest(s) over the suit property merits registration on account of adverse possession.
 - xvi. No prejudice at all shall be suffered by the defendant in the event the orders sought herein are granted.
3. According to the plaintiff's pleadings, the property the subject of the suit i.e. LR No West Mugirango/Bosamaro West/544 measuring 0.456 Hectares is to be registered in the name of Mary Nyanchama Mochagwa the defendant herein to hold it in trust for:
- a. Jared Nyabunga Ondari
 - b. Vincent Nyakango Ondari
 - c. Evans Ondieki Ondari
 - d. Alex Maseno Ondari
 - e. Bonface Nyakoe Abera
 - f. Caleb Tengeya Auka
 - g. Vincent Modi Auka
4. Vide the certificate of confirmation dated January 12, 2022 from Chief Magistrate's Court, Nyamira in Succession Cause No E112 of 2021. It is the plaintiff's case that he has occupied a portion of the suit land measuring 0.456 Hectares of the 4.4 Hectares out of LR No West Mugirango/Bosamaro West/544 for a period of over 12 years uninterrupted. He avers that he is son, legal administrator and personal representative of the estate of the late Jeriah Nyaitondi Mochaberi who purchased the aforesaid portion of land from Obaki Siango on November 17, 1976 , Auka Siango on January 10, 1980 , Morumbwa Siango on September 5, 1980 and Onsango Siango on February 14, 1981. By then the suit Land was in the name of the vendors' father one Siango Nyata who is now deceased. The plaintiff's mother took possession of the portions of the suit land in 1976, 1980 and 1981 until her demise in 1985 after which the plaintiff continued with the occupation of the parcel of land to date. On September 28, 2022 upon issue of notice to vacate, this court gave orders to the effect that pending hearing and determination of the application dated September 23, 2022 an order of temporary injunction be in place restricting the respondent from entering upon, grazing, tilling, cultivating, destroying crops and/or trees, alienating, disposing of, leasing and/or in any way from trespassing and/or interfering with the plaintiff's peaceful occupation of the 0.456 Hectares hived from Land parcel No West Mugirango/Bosamaro West/544.
5. When the above application came up for inter-parties hearing on October 19, 2022 the defendant's counsel Mr Kavita raised a preliminary objection dated October 14, 2022 on as follows:



1. That this honourable court lacks jurisdiction to entertain the matter and issue the prayers sought which essentially seeks to administer an alleged estate of Jeriah Nyaitondi Mochaberi
2. That the applicant lacks capacity to bring the suit.
3. That the applicant's suit offends the provisions of the *Law of Succession Act*, cap 160 on distribution immovable assets of deceased persons thus the same is fatally defective, incompetent, bad in law and should be struck out with costs.
6. The same was canvassed by way of highlighting of written submissions.
7. From the outset the plaintiff has claimed to have been in occupation of the suit land for a continuous period of over 12 years, uninterrupted, openly, peacefully and with the defendant's knowledge. This even after his mother's (Jeniah Nyaituti Machaberi's) demise. This alone, if proved, constitutes adverse possession in favour of the plaintiff in his own right. On the defendant's argument that by filing this suit the plaintiff seeks to distribute the estate of his late mother because he has not obtained a full grant, the defendant has not properly understood the plaintiff's case. The administrator *ad litem* must first of all file suit on behalf of the estate bringing back home what is still at large, gather them within the Estate before he thinks of distribution. What the plaintiff has done is the correct thing. Allowing him to do otherwise is equivalent to putting the cart before the horse which cannot work. Consequently, the defendant's objection dated October 12, 2022 is hereby dismissed with costs for being misplaced.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 24TH DAY OF NOVEMBER 2022.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

plaintiff: Mr Nyambati holding brief for Ms Ndemo

defendants: N/A

