



Kibiri v Kibunja (Sued as the personal representative of the Estate of Walter Kibunja Kiruri - Deceased) (Environmental and Land Originating Summons E021 of 2022) [2024] KEELC 5093 (KLR) (4 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5093 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E021 OF 2022
LN GACHERU, J
JULY 4, 2024

BETWEEN

PETER KABIRU KIBIRI PLAINTIFF

AND

VIRGINIAH WANJIRU KIBUNJA (SUED AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF WALTER KIBUNJA KIRURI - DECEASED) DEFENDANT

JUDGMENT

1. The Plaintiff herein Peter Kabiru Kibiri, filed this Originating Summons dated 15th November 2022, against Virginiah Wanjiru Kibunja, sued as a personal Representative of Walter Kibunja Kiruri, and sought for judgement against the Defendant in the following terms;
 - a. A declaration that the title deed of the deceased Walter Kibunja Kiruri to a portion measuring 1.5 acres or thereabout out of land parcel No. Loc 15 / Gakuyu/ 1263, has been extinguished and now belongs to the Plaintiff.
 - b. An order do issue requiring and directing the Land Registrar Muranga to subdivide land parcel No Loc 15/ Gakuyu/ 1263, in such a manner that of 1.5 acres aforesaid is excised from the said land and to register that portion in the name of the Plaintiff, Peter Kabiru Kibiri in place of the said Walter Kibunja Kiruri.
 - c. A declaration that the Plaintiff has acquired title to the said portion measuring approx. 1.5 acres out of land parcel no Loc 15/ Gakuyu/ 1263, by his adverse possession thereof for a period of more than 12 years from 1999, or thereabout to date and therefore Walter Kibunja Kiruri held the titles thereto in trust for the Plaintiff.



- d. An order for dissolution of the said trust and transfer of the said portion measuring approx. 1.5 acres to the Plaintiff.
 - e. The Defendant be ordered to execute all the necessary documents to effect registration of the said portion in the name of the Plaintiff and in case of default on his part, the Deputy Registrar of the court be authorized and directed to execute any and all documents necessary in place of the Defendant.
 - f. The Land Registrar Murang'a be authorized to dispense with the production of the old title deed and the PIN Certificate, National Identity Card and photographs of the Defendant, if the Defendant fails to surrender them to the Land Registrar.
 - g. The costs of the suit be borne by the Defendant.
2. The Originating Summons is premised on the various grounds set out on its face among them;
- a. The registered proprietor of the suit land Loc 15/ Gakuyu/ 1263, Walter Kibunja Kiruri died before the 1972;
 - b. That the Defendant and Samuel Kibunja Kamau were appointed as Personal Representatives of the estate of the said Walter Kibunja Kiruri, vide a Nairobi HCC SUCC CAUSE NO 1495 OF 2000, but the said Samuel Kibunja Kamau is now deceased;
 - c. That in the year 1999, Mariam Wambui (a sister in law to Walter Kibunja Kiruri) sold to the Plaintiff 1.5 acres of the suit land on assurance that she was a beneficiary of the said estate, and the sale was confirmed by her children Hassan Ruthi, John W.Kibunja, Hadija Mohammed and Rukia Wanjiru; that the purchase price was ksh 135, 000/= which he paid fully in 1999; that the said parcel of land had been demarcated into two equal parcels of land, on the ground, and thus his confidence in the transaction;
 - d. That the Plaintiff was given vacant possession of the portion sold to him by Mariam and he fenced it off and has developed it by planting trees and building permanent houses;
 - e. That the Plaintiff has been in occupation of the said portion of 1.5 acres from 1999, to date and has occupied it as the lawful owner and his occupation has been open and peaceful without any interruption from the buyer; therefore, the Plaintiff occupation of the suit land has been adverse to the title of Walter Kibunja Kiruri, and all his successors in the title and he has acquired title to the said portion by adverse possession;
 - f. That the only just and reasonable order in the circumstances is to declare the title of Walter Kibunja Kiruri in the said portion of 1.5 acres was extinguished around 2012, and to order the said land be registered in the name of the Plaintiff.
3. The Originating Summons is further supported by the Supporting Affidavit of Peter Kabiru Kibiri, the Plaintiff, who reiterated the grounds in support of the Originating Summons and further added that he managed to obtain a grant issued to Samuel Kibunja and Virginia Wanjiku Kibunja as joint administrators of the estate of Walter Kibunja Kiruri, vide Nairobi Hcc Succ Cause No 1495 of 2000.
4. He further averred that the vendor, Mariam Wambui and her children put her in occupation of the suit land in 1999, and even attempted to obtain Land Control Board's Consent for transfer, but the said transfer could not be effected as the vendor and her children, were not the registered owners. He annexed PKK5 to support that claim.



5. He also averred that neither the descendants of Mariam nor those of Walter Kibunja Kiruri, have ever sought to interfere with his possession of the suit land since he took possession and occupation in 1999.
6. He urged the court to find that he has acquired the said portion of the suit land by adverse possession.
7. This Originating Summons is opposed by the Defendant Virginia Wanjiru Kibunja, vide Notice of Preliminary Objection dated 10th July 2023 and a Replying Affidavit sworn on 20th July 2023.
8. In her Preliminary Objection, the Defendant urged the court to dismiss the suit on the grounds that;
 1. The suit is bad in law, inadmissible and incurably defective and incompetent for want of joinder of administrators.
 2. The suit offends the provisions of order 31 Rule 2 of the Civil Procedure Rules that provides for joinder of all administrators to a suit against them.
9. In her Replying Affidavit, the Defendant Virginia Wanjiru Kibunja, averred that she is a co-administrator of the estate of Walter Kibunja Kiruri(deceased), together with one Samuel Kibunja Kamau as per the annexed Grant marked VWK1. She denied the allegations that the other administrator, Samuel Kibunja Kamau, was deceased as deposed by the Plaintiff.
10. It was her contention that the other co- administrator ought to have been joined in these proceedings in his legal capacity as the administrator of the estate of Walter Kibunja Kiruri, and as informed by her advocate, it is trite law that all administrators of an estate must be joined before the matter touching on the estate of the deceased person can be heard and determined.
11. Further, that the suit property herein, Loc 15/ Gakuyu/ 1263, being part of the estate of the deceased has been part of the many controversies and cases in court. Further, that in 2002, the court cancelled all transactions with regard to the estate of the deceased including the suit property pending the hearing and determination of the Succession Cause No. 1495 of 2000, as is evident from annexure VWK 2.
12. She contended that there is a valid court order after mediation agreement was entered, which directed on how the estate of the deceased should be divided. That the present suit was filed during the pendency of the succession proceedings and thus intends to cause chaos to the administration of justice. She annexed the court order as annexure vwk3.
13. It was her further contention that in the eventual determination of the succession proceedings, then the Plaintiff herein may have a cause of action against different party/ parties and the actual beneficiaries of the estate. She argued that this suit is premature.
14. She alleged that her advocate has informed her that the selling of the estate of the deceased person amounted to intermeddling which is a criminal offence. That the Plaintiff admitted to having purchased the suit property before the estate of Walter Kibunja Kiruri, was distributed, and the vendor had no legal capacity or authority to transact from the administrators of the estate.
15. It was her further contention that the Plaintiff came into possession of the suit land through an illegal transaction, and was aware of the illegalities surrounding the said sale, and therefore, as advised by her advocate, by remaining on the suit land, the Plaintiff is persisting the illegality which is prohibited by the law.
16. Therefore, the Plaintiff cannot claim title by adverse possession over the suit land having come into possession by virtue of intermeddling with the estate, which is an illegality.
17. She urged the court to dismiss the instant suit with costs.



18. The matter was canvassed via viva voce evidence. The Plaintiff gave evidence for himself and called two witnesses, while the Defendant gave evidence for herself and called no witness.

Plaintiff's Case

19. PW1 Peter Kabiru Kibiri, from Gikarangu at Loc 15/ Gakuyu Scheme adopted his witness statement dated 28th August 2023, as his evidence in chief. He also produced his list of documents as P. Exhibits 1-18. It was his testimony that he was sold the suit property by Mariam Wambui in 1999. That this land was sold to him in the presence of one Kibunja, the son of Mariam for ksh 135,000/=.
20. He also testified that this portion that he purchased was to be carved out of Land Parcel No, Loc 15/ Gakuyu/ 1263, which was registered in the name of Walter Kibunja Kiruri and Mariam was entitled to half share of the same by virtue of customary trust. That the portion that he purchased was 1.5 acres, which he has occupied since 1999. Further, that he paid the full purchase price and was allowed possession and occupation.
21. It was his testimony that the land was never transferred to him since it was still registered in the name of Walter Kibunja, and Mariam died before she could transfer the land to him.
22. Therefore, his occupation since 1999, extinguished the owner's title in 2012 and he is in adverse possession of the portion that he purchased from Mariam, one of the beneficiaries in 1999. That he had developed the land and has built permanent residential houses, cow shed, chicken house and other developments. That he has fenced the land with a chain link and he buried his mother on the purchased portion in 2017.
23. In cross exam, by counsel for the Defendant, the Plaintiff confirmed that there was a sale agreement between himself and Mariam Wambui over the sale of her portion of land from Loc 15/ Gakuyu/ 1263, which portion was 1.5 acres.
24. It was his further evidence that he has fenced the land and he has a gate, but the title deed for the whole suit property is still in the name of Walter who is deceased. Further that succession Cause over the estate of Walter is ongoing, and he did not know how far the succession cause had gone.
25. He reiterated that he buried his mother on the suit land, and that he does not know much about the administrators of the estate as he is only interested in the portion of land that he purchased.
26. PW 2 Gachanja Kabiru, from Gikarangu village also adopted his witness statement dated 28th August 2023, as his evidence in chief. He confirmed that he knows the Plaintiff, but not the Defendant Virginia Wanjiru. It was his evidence that the land claimed by Kabiru is next to his land, and so he knows it. He also confirmed that Walter Kibunja Kiruri, initially owned the land, but later Kabiru purchased a portion thereon.
27. It was his testimony that Kabiru has constructed a house and other structures on his portion of land, and he keeps cows, chicken and had built for them. Further, that the mother to Kabiru, Agnes Wanderwa was buried on the suit land. That Kabiru has lived on the suit land for more than 22 years and he has fenced it and he grow subsistence crops.
28. On cross exam by counsel for the Defendant, he confirmed that the Plaintiff is a son to his sister, and the land that was sold to the Plaintiff was for Walter, and that he did not know Mariam, and he did not know Virginia as she stays at Nairobi. That Walter Kibunja went to the area in 1964, and he was in company of his father.



29. PW 3, Livingstone Mwangi Rurago also adopted his witness statement dated 28th August 2023, as his evidence in chief. It was his evidence that the husband to Mariam was known to him and he has also known Kabiru since his childhood and the land he is claiming is next to his.
30. It was his evidence that Kabiru built a permanent house in 2001, and while he was constructing his house, he kept the building materials on Pw3's land. That Kabiru later finished the construction and occupied the said house, and he keeps cows and chicken and he has built houses for them. It was his further evidence that he believes Kabiru owns the land in question.
31. Pw4 Mwangi Ndegwa, from Gaturi location also adopted his witness statement dated 28th August 2023, as his evidence in chief. In his statement, he stated that he has known Peter Kabiru since his childhood, and he also knows the physical location of the suit land.
32. That Kabiru had informed him that he had purchased a portion of land from the land which belonged to Walter Kibunja That thereafter, Kabiru constructed a house on the suit land and he has been occupying it since then for more than 20 years. Further, that Kabiru grows subsistence crops, Nappier grass and trees. That it is his believe that Kabiru owns the land as he has fenced it.

Defendant's Case.

33. DW1, Virginia Wanjiru from Nairobi, admitted that she is the Defendant herein. She also adopted her witness statement dated 5th October 2023, as part of her evidence. It was her testimony that she is the 2nd wife of the late Walter Kibunja Kiruri, and a co- administrator of his estate, and that Walter Kibunja died in 1983, and left behind 2 wives and various properties.
34. That among the properties of the deceased is Loc 15/ Gakuyu/ 1263, the suit land, which formed part of the properties that were to be shared to the beneficiaries of the estate of Walter Kibunja. That for that reason, Christopher Mwangi and herself were granted letters of administration to the estate of the deceased. However, Christopher later passed on and was replaced by one Samuel Kibunja Kamau as a co-administrator.
35. That there are succession proceedings on going at Milimani Law Courts, being Succ Cause No 1495/ 2000, and on 13th December 2017, there was a Mediation Agreement directing how the estate of the deceased should be divided.
36. Further that this suit land Loc 15/ Gakuyu/ 1263, being part of the estate of Walter Kibunja, has been part of the many controversies and cases in court. That in 2002, the court cancelled all transactions with regard to the estate of the deceased, including the suit property pending the determination of succession proceedings.
37. It was her testimony that the succession proceedings are still on going, and there is a dispute over fraudulent dealings over the estate and thus the Grant had partially been confirmed, awaiting full confirmation.
38. That the Plaintiff admitted to have purchased the portion of land from Mariam Wambui Ruthi, who is a sister in law to Walter, and the estate of Ruthi Kiruri was granted 50% of the deceased properties and the Plaintiff should seek his share from the said estate of Ruthi Kiruri. She stated that the present suit is brought in bad faith.
39. It was her further testimony that her co- administrator Samuel Kibunja is alive and still an administrator of the estate.



40. In cross exam by Counsel for the Plaintiff, she stated that she does not know the Plaintiff, and that she did not know who had informed the Plaintiff that Samuel Kibunja, the other co- administrator is deceased. She further confirmed that she did not join Samuel Kibunja in these proceedings. She also denied that Kabiru had used the land for more than 12 years.
41. Further, she confirmed that she has not visited the suit land, and that she knows Mariam as her sister in law, but she did not sell the land to the Plaintiff. However, she admitted that Mariam and her family are entitled to inherit this suit land, but the Plaintiff should wait until the succession cause is finalized.
42. After the viva voce evidence, the parties filed their respective written submissions. The Plaintiff filed his submissions on 30th October 2023, through the Law Firm of Waiganjo Gichuki & Co Advocates. The Defendant filed her submissions on 22nd December 2023 through the Law Firm of DR Mutubwa Law, and cited various authorities.
43. In his submissions, the Plaintiff submitted that he sued the Defendant alone because when he discovered that the Defendant and Samuel Kibunja were the Co- administrators of the estate of Walter Kibunja, vide a Grant issued on 13th December 2017, he received information that Samuel Kibunja was now deceased and the reasons for suing the Defendant alone.
44. It was his further submissions that nothing in law prevents him from suing one of the administrators of the estate, and not both of them. Further that though Order 31 rule 2 of the Civil Procedure Rules states that where there are several administrators of the estate, they shall all be made parties to the suit, the said provision of law does not place that duty solely on the Plaintiff, who may not know the whereabouts of all the administrators, and also whether they are alive or dead. It was his submissions that in this case, the Defendant was better placed to know the whereabouts of her co- administrator.
45. He relied on Order 1 Rule 9 of the Civil Procedure Rules, which provides;
- “No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”
46. He further submitted that the court should keep in mind the constitutional imperative of dispensing substantive justice as opposed to observing procedural technicalities. For this, he relied on sections 1A, 1B and 3A of the *Civil Procedure Act* and section 3 of *Environment and Land Court Act*.
47. On whether the Plaintiff should wait until the estate of Walter Kibunja Kiruri, is distributed before filing a claim, the Plaintiff submitted that this is a claim based on adverse possession, but not inheritance.
48. On the standard of prove, it was submitted that the Plaintiff was only required to prove his case on the balance of probabilities, and since Plaintiff averments that he has occupied the suit land from 1999, was not controverted, then he has proved his case on the required standard. That the Defendant admitted the Plaintiff possession, but only alleged that it was an illegality.
49. The Plaintiff urged the court to allow his prayers. Though the court had directed that the Preliminary Objection by the Defendant would be considered together with the main suit, the Plaintiff did not submit on it, and thus this court holds and finds that it is not opposed.
50. In her submissions, the Defendant set out three issues for determination:
- i. Whether the suit is fatally defective for non- joinder of Samuel Kibunja Kamau;



- ii. Whether the Plaintiff is entitled to the Orders sought; and
 - iii. Who bears the costs of this suit?
51. On whether the suit is fatally defective as stated in the Notice of Preliminary Objection dated 10th July 2023, she submitted that the suit is incurably defective as it offends Order 31 rule 2 of the Civil Procedure Rules. She submitted that she ought not to be sued alone, but with her Co- administrator as the law mandates both administrators be joined.
52. Reliance was placed in the case of Raffaella Adiyakhiso Ntotoi vs Obrian Lenguro(2012) eklr, where the court held;
- “ As the plaintiff’s application and/or suit stands now without amendment it has no chance of success for failure to have the suit brought in joint names of the administrators unless there is only one surviving administrator and for which this court finds that there was no evidence that the 2nd administrator was not alive or was out of the country.
- The upshot of this application is that the same is found to be incompetent and is struck out with costs to the respondent.”
53. Further that the provisions of Order 31 Rule 1 of Civil Procedure Rules are set out in mandatory terms and therefore the argument by the Plaintiff that it was not necessary to join all the administrators of the estate is a misapprehension of the law. Reliance was placed in the case of Zeinab Khalifa Khator & others v Abdullrazak Khalifa Salim & Aonther [2017] eklr, where the court observed that it is prohibited for one administrator to deal with the assets of the deceased person alone where there are joint co- administrators
54. The Defendant as an objector further cited the case of In the estate of Kasalon Mwangi Kahero[2013] eklr, where the court held;
- “ The application herein is brought by the Applicant alone, rather than jointly with his co-administrator. This is not proper as the Court committed the administration of the estate jointly to both of them. The two must always act together, as they ultimately will be required to account jointly of their administration of the estate.”
55. On whether the Plaintiff is entitled to the orders sought, it was submitted that the Plaintiff has not discharged her burden of proof on the required standard. It was her submissions that the Plaintiff suit is accompanied by a certificate of official search, but not an extract of title of the suit land Loc 15/ Gakuyu/ 1263, and neither is the search certificate certified as the original copy. For this, the Defendant relied on the case of Musa Kipkoskei Labatt v Laban Kipkebut Barkoto [2019] eklr, where the court held;
- “the rules do require that one needs to annex an extract of the register to a claim for adverse possession. The reason for this is not far to find, for it is important to ensure from the register, that the Applicant has a clean 12 years when the is not under the Government or any other entity for which a claim for adverse possession cannot be maintained.”
56. It was her further submissions that the requirement to annex a certified copy of the extract of title to discharge its evidential burden is a mandatory one, and failure to comply with this requirement alone



warrants dismissal of the suit. Reliance was placed in the case of *Essolly Enterprises Limited v Benjoh Amalgamated Ltd* [2019] eKLR.

57. On whether the Plaintiff is entitled to a claim of adverse possession despite intermeddling, the Defendant submitted that the Plaintiff came into possession of the suit land through an illegal act of intermeddling and stayed in possession of the same in contravention of the statutory provision prohibiting possession of land after a void transaction. That the land was sold to the Plaintiff by a person who had no authority to transact in the land as the grant had not been confirmed and had no good title. Further that at the time of commencing the said transaction, proceedings had been commenced in respect of the estate of Walter Kibunja Kiruri for purposes of succession. Therefore, the Plaintiff's action amounted to intermeddling in the estate of a deceased person.

58. Reliance was placed on several cases among them the case of *Veronica Njoki Wakagoto (deceased)* [2013] eKLR, where the court stated as follows;

“The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”

59. That the Plaintiff action of purchasing undistributed estate was an illegality and therefore he cannot benefit from the same and the court should not be used to countenance an illegality. Reliance was placed in the case of *Gabriel Mbui v Mukindia Maranya* [1993], eKLR, where the court held;

“A crime would have been committed by the adverse possessor. Do we turn round and reward the criminal by awarding him title to land?

Remaining in the land and holding on to possession thereof after the arrangement under which you entered became void by operation of the law is to persist in an illegality, to commit a crime, and to do that which is prohibited by the law; it is not to acquire title by adverse possession.....”

60. Therefore, it is her further submissions that the Plaintiff claim for adverse possession was a false start ab initio, as the Plaintiff came into possession of the suit land through an illegality and therefore, his suit should be dismissed with costs.

61. The above are the pleadings, the evidence adduced in court and the rival written submissions, which this court has carefully considered. The court has also considered the available evidence and the exhibits produced thereon. The court too has read the rival written submissions, the cited authorities and the relevant provisions of law and finds the issues for determination are as follows;

i) Whether the Preliminary Objection as filed by the Defendant meets the threshold for a Preliminary Objection and if so, whether it is merited;

ii. Whether the Plaintiff's suit is merited?

ii. Who will bear costs of this suit?

62. I) Whether the Preliminary Objection as filed by the Defendant meets the threshold for a Preliminary Objection and if so, whether it is merited?



63. Before answering this issue, the Court will look at the definition of Preliminary Objection as was held in the case of; Mukisa Biscuit Manufacturing Co. Ltd Vs Westend Distributors Ltd [1969] E.A. 696 as follows: `
- “...a ‘Preliminary Objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
64. From the above decision, it is clear that a Preliminary Objection consists of pure points of law and does not call for ascertainment of facts. The Supreme Court in the case of Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others Civil Application No. 36 of 2014 [2015] eKLR held that a Preliminary Objection should be founded upon a settled and crisp point of law.
65. Further, in the case of Oraro v Mbaja [2005] eKLR, the Court found that if facts must be proved using the rules of evidence, then this is not a true Preliminary Objection based on a point of law:
- “I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed...”
66. Considering the above definition, this court will now carefully look at the filed Notice of Preliminary Objection and juxtapose it with the description of Preliminary Objection to arrive at a finding, of whether what has been filed is a pure point of law and thus a Preliminary Objection.
67. The bone of contention is that the Plaintiff offended the provisions of Order 31 rule 2 of the Civil Procedure Rules, which provides for joinder of all Administrators to a suit, and therefore the suit is bad in law, defective, inadmissible and incompetent.
68. Order 31 Rule 2 provides;
- “Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them: Provided that the executors who have not proved their testator’s will, and trustees, executors, and administrators outside Kenya, need not be made parties.”
69. If the Plaintiff offended the clear provisions of law, then the instant Preliminary Objection is thus on a pure point of law and the court does not need to ascertain facts elsewhere.
70. Further, a Preliminary Objection can preliminarily terminate a matter. In the event the court finds that the Plaintiff has flouted clear provisions of law, then it may proceed to dismiss the instant suit. therefore, the instant Preliminary Objection is a pure point of law and it meets the description of what is a preliminary Objection as held in the Mukisa Biscuits case.
71. If the Notice of Preliminary Objection herein raises pure point of law, is it merited? In determining this issue, the court will consider what Order 32 Rule 2 of the Civil Procedure Rules provides and



whether it is couched in mandatory terms, and can it be cured by Article 159(2)(d) of *the Constitution*, or sections 1A,1B,3A of the *Civil Procedure Act*, and section 3 of ELC Act as submitted by the Plaintiff.

72. It is the Defendant's case that Samuel Kibunja Kamau and herself are the co- administrators of the estate of Walter Kibunja Kiruri, which was grant was issued on 13th December 2017. As joint administrators they are supposed to administer the estate of the deceased as provided by Section 82 of the Succession Act, which reads;

“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;
- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that — (i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and (ii) no immovable property shall be sold before confirmation of the grant;
- (c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;
- (d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation:

73. The co-administrators are in respect of the grant issued over the estate of Walter Kibunja Kiruri(deceased), and the two administrators are supposed to administer the estate jointly. Thus, any suit brought on behalf of the estate should be brought and defended by the joint administrators.

74. Indeed, Order 31 Rule 2 of Civil Procedure Rules, provides that where there are several trustees, executors or administrators, they shall be made parties to the suit against one or more of them. This provision of law is couched in a mandatory terms, and thus must be adhered to.

75. The Defendant contended that the suit is bad in law and incurably defective since the Plaintiff failed to sue the two co- administrators, but sued the current Defendant alone, as one of the administrators of the estate of Walter Kibunja Kiruri. The Plaintiff did admit that indeed, in the investigations of who to sue, he came across the grant issued over the estate of Walter Kibunja Kiruri, and noted that there were two co-administrators.

76. However, he further alleged that he was also informed that Samuel Kibunja Kamau, one of the administrator was deceased, and thus the reasons why he did not sue the two co-administrators of the estate. However, he did not have any proof of death of the said co- administrator, Samuel Kibunja Kamau.

77. The Defendant alleged that Samuel Kibunja Kamau, the other co- administrator is alive and kicking, and he should have been joined in the suit as a Defendant. The Plaintiff submitted that since he did



not know all the administrators, the Defendant too had a duty to join her co-administrator. However, it is clear that this case is brought by the Plaintiff, and it's his case. It is him, who has alleged and the burden of proof remains with him.

78. This being the Plaintiff's case, he ought to have ensured that he has adhered to the laid down provisions of law. Adhering to Order 31 rule 2, of Civil Procedure Rules, is not a procedural technicality which can be cured by Article 159(2)(d) of Civil Procedure Rules, or Section 3A of the *Civil Procedure Act*, but a legal requirement. Thus the Plaintiff failed to adhere to a very crucial provision of law.
79. The Defendant filed the Preliminary Objection on 10th July 2023, and her Replying Affidavit on 20th July 2023. Thus, the Defendant brought to the attention of the Plaintiff this omission, and if he was keen and he so wished, he could have filed an Application to amend his pleadings to include the co-administrator.
80. The Plaintiff did not amend his pleadings to include the co-administrator, even after learning of his omission. In the circumstances, the court finds the suit herein incurably defective for failure to join the Co-administrator as a Defendant in this suit.
81. The court will borrow from various decided cases. In the case of *Raffaella Adiyakhiso Ntotoi v Robert Obrian Lenguro* [2012] eKLR, the court held as follows;

“as the Plaintiff's application and/or suit stands now without amendment, it has no chance of success for failure to have the suit brought in joint names of the administrators unless there is only one surviving administrator, and for which this court finds that there was no evidence that the 2nd administrator was not alive or was out of the country. The upshot of this application is that the same is found to be incompetent and is struck out with costs to the Respondent”

82. Further in the case of *Estate of Kasalon Mwangi Kahero* [2013] eKLR, the court held as follows;

“the application herein is brought by the applicant alone, rather than jointly with his co-administrator. This is not proper as the court committed the administration of the estate jointly to both of them. The two must always act together, as they ultimately will be required to account jointly of their administration of the estate”

83. Having found that the Plaintiff omitted to join the co-administrator as the Defendant to this suit as provided by Order 31 Rule 2 of the Civil Procedure Rules, then this court finds that it has no option but to declare this suit incompetent and incurably defective for flouting the clear provisions of law. Consequently, the Preliminary Objection herein is upheld as filed by the Defendant.
84. Even if the Plaintiff had sued the co-administrators jointly, could the suit have succeeded?
85. The Plaintiff's suit is a claim of adverse possession, which is a claim hinged on long occupation of the suit land, without the consent of the owner. See *Mombasa Civil Appeal No. 53 of 2017 Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] eKLR, where the Court stated as follows;

“Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual, open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, *nec vi nec clam nec precario*.”



Further, in the case of *Samuel Kihamba v Mary Mbaisi* [2015] eKLR the court held:

“Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land”

86. The Plaintiff alleged that he got into possession and occupation of the suit land in 1999, by virtue of purchase from one Mariam Wambui Ruthi, who was a beneficiary of the estate of Walter Kibunja Kiruri. His entry was therefore with permission of one of the beneficiaries of the deceased’s estate.
87. During this transaction, the estate of Walter Kibunja Kiruri was going through a succession process. In fact, in the year 2000, all transactions relating to the estate of Walter Kibunja Kiruri, were cancelled, the sale by Mariam Wambui Ruthi included.
88. From the documents produced in court by the Plaintiff, it is clear that the family of the late Ruthi Kiruri, led by one John Kibunja, were not in opposition to the sale of the portion of land claimed by the Plaintiff.
89. It is not in doubt that by the time of such sale and occupation of the suit property by the Plaintiff, the suit land was still under the name of the deceased Walter Kibunja Kiruri. This land was not sold by the co- administrators then, Virginia Wanjiru Kibunja and Christopher Kibunja, but by an intended beneficiary of the estate of Walter Kibunja Kiruri.
90. This sale and occupation of the suit land amounted to dealing with the estate of the deceased before succession proceedings had been concluded. This is against section 45 of the Law of succession and amounted to intermeddling with the estate of the deceased. The Plaintiff entered into the suit land through an illegality, which he cannot enforce in a court of law. Section 45 of the Law of succession provides;

“No intermeddling with property of deceased person

- (1) 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.
 - (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”
91. There is no doubt that the Plaintiff bought the suit land, and has not gotten his title yet. However, he cannot enforce his right by suing the administrators of the estate, who never sold the said land to



- him. He is supposed to enforce his right against the beneficiaries of the estate of Ruthi Kiruri, after the distribution of the estate, or he should have sought to be joined in the succession proceedings and claim from the relevant beneficiaries.
92. Indeed, the estate is partially distributed through a Court order which emanated from a Mediation Agreement dated 13th December 2017, wherein the family of Christopher Ruthi Kiruri(deceased), is entitled to 50% of the property held by the deceased. The suit property is one of them, and the Plaintiff should thus enforce his claim against the beneficiaries of the estate of Christopher Ruthi Kiruri, Mariam Wambui, the vendor being one of them.
93. The Plaintiff herein though has a claim chose to file a suit against the wrong party. There are plethoras of cases on the issue of intermeddling. The court will rely on a number of them. In the case of Veronichah Njoki Wakagoto(deceased) (2013) eKLR as cited by the Defendant, the court held...
- “ the effect of section 45 is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the law. Such authority emanates from the grant of representation and any person who handles estate property without authority is guilty of intermeddling. the law takes a very serious view of intermeddling and makes it a criminal offence”
94. Clearly Mariam Wambui did not have authority to sell the suit property without authority of the co-administrators, and her action being the basis of the Plaintiff’s occupation of the suit land precludes the Plaintiff from claiming that he entered the suit land after having purchased the portion of land from Mariam Wambui. Mariam’s action was an illegality, which cannot be enforced by this court.
95. In the case of In re Estate of M’Ngarithi M’Miriti [2017] eKLR it was held that:
- “Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act*. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the *Law of Succession Act*. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”
96. Having now carefully considered the instant Notice of Preliminary Objection and the rival written submissions herein and the relevant provisions of law, the court finds it merited and is upheld and the suit is struck out for having failed to sue the co- administrator of the estate of Walter Kibunja Kiruri.
97. Further, even if the Preliminary Objection had failed, the suit herein is found not merited as the said portion of land was sold by a beneficiary of the estate, who was not authorized to sell, committed an offence of intermeddling and an offence cannot give the basis of the Plaintiff’s entry into the suit land.



iii).Who should bear costs of the suit?

98. Ordinarily costs follow the event, and is granted at the discretion of the court, unless special circumstances exist to prevent such costs being granted. No such circumstances exist herein, and for that reason, costs will be granted to the successful litigant herein, who is the Defendant. Court is guided by section 27 of the [Civil Procedure Act](#).

99. For the above reasons, this suit is struck out and/or dismissed entirely with costs to the Defendant herein.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 4TH DAY OF JULY, 2024.

L. GACHERU JUDGE.

Delivered online in the presence of;

Joel Njonjo - Court Assistant

Mr Gichuki Waiganjo for the Plaintiff

M/s Martim H/B for Dr Mutubwa for the Defendant

L. Gacheru Judge.

04/07/2024

