



**Rithara v Mwamba & 2 others (Sued as the administrators of the Estate of M’Mwamba M’Munyua - Deceased) (Environmental and Land Originating Summons E013 of 2021) [2024] KEELC 13602 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13602 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MERU**  
**ENVIROMENTAL AND LAND ORIGINATING SUMMONS E013 OF 2021**  
**CK YANO, J**  
**DECEMBER 5, 2024**

**BETWEEN**

**STANLEY GATOBU RITHARA ..... PLAINTIFF**

**AND**

**CHARITY NGUGI MWAMBA ..... 1<sup>ST</sup> DEFENDANT**

**CATHERINE KATHURE MWAMBA ..... 2<sup>ND</sup> DEFENDANT**

**GRACE KIENDE MWAMBA ..... 3<sup>RD</sup> DEFENDANT**

**SUED AS THE ADMINISTRATORS OF THE ESTATE OF M’MWAMBA  
M’MUNYUA - DECEASED**

**RULING**

1. The plaintiff commenced these proceedings vide the Originating summons dated 11<sup>th</sup> March, 2020. The defendants are sued as the administrators of the estate of M’Mwamba M’Munyua (deceased). The plaintiff’s claim is that he is entitled to be registered as proprietor by adverse possession of one (1) acre of that parcel of land known as L.R no. ABOTHUGUCHI/GITIE/183 in place of the present registered proprietors.
2. The plaintiff is seeking for determination of the following questions-;
  1. Whether the plaintiff has been in open, exclusive, continuous and uninterrupted occupation of 1 acre of the suit parcel of land number Abothuguchi/Gitie/183 for over 12 years.
  2. Whether the said occupation has been adverse to the registered owner and whether the defendants deceased father’s title to parcel of land number Abothuguchi/Gitie/183 in respect of 1 acre thereof has been extinguished by dint of Section 37 and 38 of Limitations of Actions Act (Cap 22) Laws of Kenya.



3. Whether the register of the suit land parcel of land number Abothuguchi/Gitie/183 should be rectified and the plaintiff registered as the owner of 1 acre thereof.
  4. Whether the Deputy Registrar of the honourable court should be empowered to sign all the necessary documents to transfer 1 acre of the suit land parcel of land number Abothuguchi/Gitie/183 in default of the defendants so signing.
  5. Whether the defendants should pay the plaintiff costs hereof.
3. The summons was supported by the affidavit of Stanley Gatobu Rithara sworn on 11<sup>th</sup> March, 2021. The plaintiff avers that the defendants are the administrators of the estate of the late M’Mwamba M’Munyua (deceased) who is the registered owner of the suit land number Abothuguchi/Gitie/183 after the succession court in Meru HC Succession cause no. 29 of 2006 ordered the same to revert to the defendants deceased father. The plaintiff annexed copies of the search and the court order marked “SGR – 01 (a) & (b).”
  4. The plaintiff states that on 26<sup>th</sup> January, 2006 the defendant’s deceased brother Mark Marocho Mwamba (deceased) and the plaintiff entered into an agreement for sale of land where the deceased agreed to sell and the plaintiff agreed to buy 1 acre to be excised from the suit land to enable them file the aforesaid succession cause.
  5. The plaintiff avers that on 30<sup>th</sup> January, 2006 when he paid the full consideration price of Kshs. 120,000/= to the said Mark Marocho Mwamba(deceased), the 2<sup>nd</sup> administrator Charity Ngugi Mwamba was present and she signed as a witness. The plaintiff has annexed copies of the agreement dated 26<sup>th</sup> January, 2006 and an acknowledgement of receipt dated 30<sup>th</sup> January, 2006.
  6. The plaintiff states that he took possession of 1 acre of the suit land on 15<sup>th</sup> March 2006 as per clause 3 of the aforesaid agreement and commenced developments.
  7. The plaintiff states that it was after the death of their aforesaid brother Mark Marocho Mwamba (deceased) on 31<sup>st</sup> October, 2013 that the administrators changed their minds and now want to dispossess him the aforesaid 1 acre for which he has been in occupation for 15 years and has reliably learnt that they had sold the same to a 3<sup>rd</sup> party. The plaintiff has annexed a copy of the death certificate of Mark Marocho Mwamba Marked “SGR – 03”.
  8. The plaintiff avers that the development he has made on the suit land include planting of seasonal crops, exotic and traditional trees and installed piped water for irrigation. The plaintiff has annexed photographs marked “SGR -04.”
  9. The plaintiff states that he entered the suit land without force, without secrecy and without persuasion since 15<sup>th</sup> March, 2006 and his occupation has been continuous, unbroken and or uninterrupted, hence his claim for adverse possession.
  10. In response to the claim the defendants filed a replying affidavit dated 11<sup>th</sup> March 2022 sworn by Catherine Kathure Mwamba. She avers that the defendants are the children of the late M’Mwamba M’Munyua and therefore the beneficiaries of the whole suit land herein. That her entire family resides and utilizes the suit land to the exclusion of the plaintiff.
  11. The defendants states that the suit land was distributed as per the judgment of Hon. Lady Justice. T.W. Cherere delivered on 4<sup>th</sup> March, 2021 in Meru High Court Succession No. 29 of 2006. The defendants attached a copy of the said judgment and the certificate of confirmation of grant marked CKM – 1 a and CKM – 1b respectively.



12. The defendants aver that the plaintiff has never resided and/or utilized the suit land. They further denied that the plaintiff entered into any sale of land agreement with M’Mwamba M’Munyua (deceased) during his lifetime. The defendants aver that at the time of the execution of the purported agreement between him and the late Mark Marocho Mwamba, the suit land was registered under the name of their late father M’Mwamba M’Munyua.
13. The defendants aver that both parties to the agreement were intermeddlers thereby making their agreement illegal. That the said Mark Marocho Mwamba did not have proprietary rights to transfer the suit land to the plaintiff. The defendants state that under clause two of the said agreement, it is clear that the plaintiff was aware that the vendor had no proprietary rights to transfer the suit land to him. That if at all the plaintiff has any claim the said claim is against the estate of Mark Marocho Mwamba (deceased) who purportedly entered into a land sale agreement with the plaintiff. That the plaintiff’s claim cannot be against the estate of the late M’Mwamba M’Munyua.
14. The defendants further aver that the plaintiff has not had quiet and peaceful occupation of the suit land for more than 12(twelve) years as alleged. They contend that the plaintiff has never resided and/or utilized the suit land. That the structures attached to the plaintiff’s supporting affidavit are not on parcel No. Abothuguchi/Gitie/183. The defendants further contend that it is misleading for the plaintiff to attach photos of structures not on their land. That if the orders sought by the plaintiff are granted, it will amount to evicting the beneficiaries of the estate of M’Mwamba M’Munyua from their family land yet M’Mwamba M’Munyua never entered into any agreement with the plaintiff.
15. The defendants aver that the plaintiff intermeddled with the estate of Mwamba Munyua and they urged the court not to aid him further in enforcing an unlawful transaction. That granting the orders sought by the plaintiff will amount to the court sanitizing the aforesaid illegality.
16. The defendants state that the application is bad in law and the same should be dismissed with costs to them.
17. At the hearing, Stanley Gatobu Rithara, the plaintiff herein testified as P.W 1 and called one witness. He relied on his affidavit in support of the summons sworn on 11<sup>th</sup> March, 2021 as his evidence. The plaintiff also produced a consent dated 6<sup>th</sup> October, 2022 as P exh 1, certificate of official search marked as P exh 2, a court order issued on 4<sup>th</sup> March 2021 as P exh 3, a sale agreement dated 26<sup>th</sup> January, 2006 as P exh 4, acknowledgement receipt dated 30<sup>th</sup> January, 2006 as P exh 5, a death certificate dated 26<sup>th</sup> September, 2018 as P exh 6, and Photographs as P exh 7.
18. The plaintiff stated that he has been utilizing the suit land for over 15 years and started using the land on 15<sup>th</sup> March 2006. He stated that he is farming maize and bananas as well as planted trees thereon.
19. The plaintiff testified that for the entire period he has been using the land there was no interference until 2021 when the 1<sup>st</sup> defendant threatened him and he came to court. The plaintiff testified further that he obtained an order reinstating him back to the land and he is still using it to date. That before 2021, he has been using the land exclusively.
20. The plaintiff asked the court to order for his registration as the owner of the land.
21. When the plaintiff was cross examined by Mr. Wambua learned counsel for the defendants, he stated that he took measurements of the land on 15<sup>th</sup> March, 2006, but he did not have a survey report showing that the land had been measured, though it was there.
22. The plaintiff referred to the judgment in succession cause No. 29 of 2006 in the defendant’s list of documents, which indicated that the defendants became joint administrators on 27<sup>th</sup> February, 2018.



- He stated that although the defendants did not have the land registered on their names they became administrators of their brother who had sold him the land. The plaintiff stated that he was not sure if the land reverted back to the defendant's deceased father and was subdivided.
23. The plaintiff stated that the succession court made orders on 4<sup>th</sup> March 2021 and he filed the instant suit on 10<sup>th</sup> March, 2021. The plaintiff further stated that he entered into the sale agreement with the deceased, Mark Marocho on 26<sup>th</sup> January, 2006. The plaintiff was shown the green card of the suit land that was opened on 24<sup>th</sup> November, 1972 in the name of Mwamba Munyua on 2<sup>nd</sup> February, 2012,
  24. The plaintiff stated that he was aware that Mark Marocho Mwamba (deceased) was survived by Savera Kathure and Ireen Nkatha. The plaintiff stated further that he was aware that the succession court declared his sale agreement as illegal. That the certificate of confirmation of grant dated 27<sup>th</sup> April 2021 has not been revoked.
  25. The plaintiff testified that he had obtained temporary orders inhibiting the defendants from accessing their respective shares.
  26. The plaintiff was re-examined by Ms Kiyuki, learned counsel for the plaintiff. He stated that he filed an application before court and it is the defendants who consented with him on 6<sup>th</sup> October, 2022 as evidenced by P exh 1.
  27. The plaintiff stated that he was not challenging the succession cause judgment. That the one acre he is claiming is the one he bought out of the 3.2 acres and that the defendants were present. The plaintiff stated that he is claiming because he has been using the one acre for over 15 years. The plaintiff reiterated that he entered into an agreement for sale on 26<sup>th</sup> January, 2006 with Mark Marocho Mwamba, but the owner of the land was M'Mwamba Munyua.
  28. The plaintiff testified that the order dated 4<sup>th</sup> March, 2021 ordered that the partition and resultant titles to revert to the name of M'Mwamba M'Munyua (deceased). That the share for Mark Marocho went to Savera Kathure and Ireen Nkatha.
  29. The plaintiff stated that he came to court seeking inhibition orders because he had bought the land and has been using it.
  30. 2 was Nicholas Muthomi Mutunga. He adopted his statement dated 5<sup>th</sup> March, 2024 as his evidence in chief. P.W 2 testified that he knows the plaintiff and that he has been working on his farm since the year 2006. P.W 2 stated that he did not know the registration number of the land.
  31. 2 was cross examined by Ms Murugi, learned counsel for the defendants. He stated that he was born in Gitie and has been the defendants neighbour since his childhood. He stated that he was not aware if the suit land was purchased. P.W 2 reiterated that the plaintiff gives him work in his land whenever there is work to be done.
  32. 2 was also re-examined by Ms Kiyuki and he reiterated that he was not aware if the suit land was purchased.
  33. D.W 1 was Catherine Kathure. She adopted her affidavit dated 11<sup>th</sup> March, 2022 and statement dated 12<sup>th</sup> June 2023 as her evidence in chief. She also produced a judgment in Meru Succession No. 29 of 2006 marked D exh 1, a certificate of confirmation of grant marked D exh 2, a copy of the green card for L.R No. Abothuguchi/Gitie/183 marked P exh 3 and photographs of the suit property marked P exh 4.
  34. D.W 1 was also cross examined and re-examined. She stated that the original owner of the suit land was her late father M'Mwamba M'Munyua who died in 1985. D.W 1 stated further that she is not



- married but she has 4 children. That she was once married in 2004 but came back to her father's home in 2014. D.W 1 testified that her brother Mark Mwamba died in 2013. That before she came back, her late brother Mark Mwamba was the one using the land. That her mother died in 1992.
35. D.W 1 stated that she came to know the plaintiff after her brother's demise. That her brother never told them that he had sold land to the plaintiff. D.W 1 testified that when she returned home, they asked the plaintiff to vacate from the suit land. She stated that she knew that the plaintiff was using the land in 2017. That they filed a consent in the case for the plaintiff to continue utilizing one acre.
  36. D.W 1 stated that they had not connected water to the one acre that the plaintiff is using. D.W 1 reiterated that before she returned home, it was only her brother Mark who was using the land since she was staying far. That she could not evict the plaintiff from the land because she was not staying there. D.W 1 stated that she was not aware that the plaintiff was using the land. That her brother Mark did not notify them that the plaintiff was using part of their land.
  37. D.W 1 stated that the photographs do not show that it is for parcel No. 183. That the succession court gave her  $\frac{3}{4}$  of one acre. She stated that her parent's house had fallen down and she put up her own house where she lives with her children and sister, the 2<sup>nd</sup> defendant.
  38. D.W 1 stated that they advised the plaintiff to claim from the estate of Mark Maracho Mwamba, but he refused since it was less than an acre. That the plaintiff was present during the succession proceedings, but he was not recognized by the court
  39. D.W 2 was Charity Ngugi Mwamba. She also adopted her statement as her evidence in chief and was cross examined and re-examined.
  40. D.W 2 admitted that she was present when the acknowledgement between her brother Mark and the plaintiff was signed in an advocate's office. That was in 2006. She stated that she left home for town around 2006 and returned in 2021.
  41. D.W 2 reiterated that it is their late brother Mark who was using the land. D.W 2 stated that she did not know when the plaintiff entered the land or when he started using it.
  42. D.W 2 stated that the plaintiff left the land voluntarily after they were given the land by the Succession Court. That they had not stopped the plaintiff from using the land. D.W 2 stated further that the 1<sup>st</sup> defendant returned home around 2014 – 2015 and when she returned home in 2021, the plaintiff was not using the land. D.W 2 testified that they learnt during the succession cause that the plaintiff was claiming one acre of the suit land. That apart from signing the acknowledgment on 30<sup>th</sup> January, 2006, she had not seen the sale agreement dated 26<sup>th</sup> January, 2006 between the plaintiff and the deceased. D.W 2 stated that they had not discussed and agreed on the distribution of their father's land. That after the succession cause, the land was divided into 4 portions, and each of them given his/her share. She failed to understand why the plaintiff did not sue the estate of the late Mark Marocho. That the claim by the plaintiff should be on the late Mark Marocho's share/portion.
  43. The court directed parties to file written submissions but only the defendants filed their submissions dated 3<sup>rd</sup> August, 2024 through the firm of Meenye and Kirima advocates.
  44. The defendants gave a background of the case and identified two issues for determination. The first being whether the defendants are the registered owners of the suit property and the second one is whether the plaintiff has proved adverse possession.
  45. While submitting on the first issue, the defendant relied on Muranga ELC Number 7 of 2021 Stephen Mwangi Gatunge Versus Edwin Onesmus Wanjau (suing in her capacity as the administrator of the



estate of Kimingi Wariera) in which the court found that for a claim for adverse possession to issue, it is important that the suit land be clearly identified as was held in *Wilson Kazungu Katana and 101 others vs Salim Abdalla Bakshwein & another* [2015] eKLR.

46. The defendant submitted that in the instant case the plaintiff has not properly identified the property that he is claiming and further that no evidence of ownership has been properly demonstrated to the court. That a search produced by plaintiff indicated the name of the defendants' deceased's brother as the proprietor, but the title was cancelled and reverted back to the original owner in succession cause number 29 of 2006 where the court found that Mark Marochi Mwamba, the defendants' deceased brother had intermeddled with his deceased's father's estate. It was therefore submitted that the court should consider that the plaintiff has not described the specific location of the parcel he is claiming out of the larger portion of land and neither has he clearly identified the registered owner of the suit property.
47. Regarding the second issue which is whether the plaintiff has proven adverse possession the defendants cited Section 107 of the *Evidence Act* which provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The defendants relied on the case of *Gabriel Mbui Vs Mukindia Maranya* (1993) eKLR.
48. The defendants submitted that the plaintiff asserted in his Originating Summons that he has been in open, exclusive, continuous and uninterrupted occupation of 1 acre of the suit land parcel of number Abuthuguchi/Gitie/183. That the burden to prove such possession lies with the plaintiff. It is the defendants' contention that the plaintiff has not been able to prove his claim. That the plaintiff's supposed occupation of the suit property is that he has planted seasonal crops, exotic and traditional trees and installed piped water for irrigation. That by the photos he has shared, the court cannot make inference that he used the property to the exclusion of the defendants. That further, all the defendants denied knowing that he was in occupation of the suit property and they averred that their brother was the one who had been in occupation of the suit property before his demise.
49. The defendants further submitted that the plaintiff sought to rely on a sale agreement between him and the defendants' deceased brother as well as an acknowledgement receipt signed by the 2<sup>nd</sup> defendant. They submitted that the acknowledgment receipt does not indicate what the payment was for and that at the time, the 2<sup>nd</sup> defendant was unaware of the sale.
50. It is the defendants' submission that in High Court Succession cause number 29 of 2006, the plaintiff filed a protest claiming an interest as a purchaser, but the court found that the defendants' deceased brother had no proprietary interests to transfer to the plaintiff. The defendants submitted that the initiation of the present suit is an afterthought after his prayers were denied in the High Court.
51. It is therefore the defendants' submissions that the plaintiff has not clearly identified the registered owners of the parcel he is claiming neither has he properly identified the property. Further that he has not proven that he adversely possessed the one acre of the property.

### **Analysis and Determination**

52. I have considered the pleadings, the evidence adduced and the submissions filed. I have also taken into account the applicable law. The issue for determination is whether the plaintiff has proved his claim for adverse possession.
53. The principle of adverse possession has been dealt with in many decisions of the superior courts and therefore, I need not reinvent the wheel. In the Indian case of *Bejoi chundra Vs Kallyprosonno* [1878], 4 Cal 1327, at P 329, Mr. Justice Markby defined adverse possession to mean "possession by a person



holding the land on his own behalf (or on behalf) of some person other than the true owner, the true owner having a right to immediate possession.” This definition was approved in the case of *Jandu V Kirpal and another* (1975) EA 225 at P 232.

54. Adverse possession has also been defined as the nonpermissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner’s enjoyment of the land for the purposes for which the owner intended to use it.
55. Therefore, adverse possession is a doctrine under which a person in possession of land owned by someone else may acquire title to it. In Kenya, this doctrine is alive in Section 7 of the *Limitation of Actions Act* which provides that an action may not be brought by anyone to recover land after twelve years from the date on which the right to action accrued to him, or if it accrued to some person through whom he claims to that person.
56. As a general rule, under Section 17 of the said Act, at the expiration of the period prescribed by the Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.
57. Where a person claims to have become entitled by adverse possession to land registered under any land registration enactment, he is allowed by Section 38 to apply to the High Court for an order that he be registered as the proprietor of the land in place of the person then registered as the proprietor.
58. However, certain essential prerequisites must be met for a claim of adverse possession to succeed. In order to found a title by prescription, the user as of right must be longus usus per vim nec clam, nec precario which enjoined that the user shall not be by violence, stealth or permission.
59. The person claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period of twelve years (see *Wambugu V Njuguna* (1983) KLR 173 and *Mtana Lewa Vs Kahindi Ngala Mwangandi* [2015] eKLR among others). It has also been held that the occupation of the land by the person who pleads adverse possession must be nonpermissive use i.e without permission from the true owner of the land occupied. Permissive occupation is inconsistent with adverse possession. In the instant case, it is not in dispute that the plaintiff is asserting his claim pursuant to a sale agreement dated 26<sup>th</sup> January, 2006 between him and Mark Marocho Mwamba (deceased). The plaintiff claims that the deceased, who was a brother to the defendants herein, sold him one (1) acre out of the suit land comprising of LR No. Abothuguchi/Gitie/183. The plaintiff pleaded that he took possession of the said one(1) acre on 15<sup>th</sup> March 2006. That his possession has been continuous and uninterrupted for 15 years.
60. From the evidence on record, it is clear that whereas Mark Marocho Mwamba (deceased) held himself as owner of the suit land and purported to sell one (1) acre thereof to the plaintiff, the truth of the matter is that the land was still registered in the name of the late M’Mwamba M’Munyua (deceased) who was survived by 4 children, Mark Marocho Mwamba (now deceased) and the defendants herein. Whereas letters of administration were issued to Mark Marocho Mwamba on 21<sup>st</sup> February, 2011 in Meru High court Succession Cause No. 29 of 2006 in respect of the estate of M’Mwamba M’Munyua (deceased) it is apparent that sale agreement between the plaintiff and Mark Marocho Mwamba (deceased) was illegal, null and void since it was in respect of the property of a deceased person. Section 45 of the *Law of Succession Act* provides that no person shall for any purpose, take possession or dispose of or otherwise intermeddle with, any free property of a deceased person. This is exactly what the plaintiff



and Mark Marochi Mwamba (deceased) did when they purported to enter into a sale agreement on 26<sup>th</sup> January, 2006 which was after the death of the deceased and before confirmation of the grant. The said sale of the land violated Section 45 of the *Law of Succession Act* and this court cannot aid the plaintiff in considering it while computing the time he entered the land since the transaction was unlawful. Indeed, this was found by the succession court on 4<sup>th</sup> March 2021 when it dismissed the protest filed by the plaintiff herein in the succession cause. In my view, the plaintiff can only pursue the estate of Mark Marochi Mwamba (deceased) and not the defendants herein who are sued as the administrators of the estate of M’Mwamba M’Munyua (deceased).

61. Further, I am persuaded that the plaintiff has not properly identified the property that he is claiming. It is not clear whether the one (1) acre that was purportedly sold to him by Mark Marochi Mwamba fell under the share given to him after the succession court distributed the land on 4<sup>th</sup> March 2021, or it fell on a portion for a different beneficiary.
62. In this case, the plaintiff has been in possession of the suit land as a result of permission given him by Mark Marochi Mwamba (albeit unlawfully). The land did not belong to Mark Marochi Mwamba as it was still registered in the name of M’Mwamba M’Munyua (deceased). Possession by leave, licence or permission of the owner (though wrongly in this case) is not adverse possession. Moreover, the plaintiff has failed to describe the specific location of the one (1) acre he is claiming out of the larger portion of the land. And even if he did, it is my view that the plaintiff can only maintain a claim against Mark Marochi Mwamba or his estate and not the defendants herein.
63. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am not satisfied that the plaintiff has proved his case on a balance of probabilities. It is my finding that the plaintiff has failed to bring himself within the limits of the doctrine of adverse possession. Consequently, the plaintiff’s suit is dismissed with costs to the defendants.
64. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 5<sup>TH</sup> DAY OF DECEMBER, 2024.**

**IN THE PRESENCE OF**

Court Assistant –Lenah

Gikunda holding brief for Ms Murugi for defendants

John Muthomi for plaintiff

**C.K. YANO**

**JUDGE**

