



REPUBLIC OF KENYA



**KENYA LAW**  
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**M'Rukunga v Nkina ((Sued as the legal representative of Kaburo Kiara)) (Environment & Land Case 160 of 2014) [2023] KEELC 421 (KLR) (1 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 421 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 160 OF 2014**

**CK NZILI, J**

**FEBRUARY 1, 2023**

**BETWEEN**

**LAZARO M'AMAI M'RUKUNGA ..... PLAINTIFF**

**AND**

**SABERA NKINA ..... DEFENDANT**

**(SUED AS THE LEGAL REPRESENTATIVE OF KABURO KIARA)**

**JUDGMENT**

1. The plaintiff took out an originating summons dated 1.10.2014 seeking the court to declare him entitled to LR No. Nyaki/Thuura/741 by virtue of adverse possession. The Originating Summons was supported by an affidavit sworn by Razaro M'Amal M'Rukunga on the even date where he attached copies of the land register for the suit land and his witness statements.
2. The defendant opposed the claim through a replying affidavit by Sabera Nina, a memorandum of response, witness statements and a list of documents all dated 6.2.2020. The defendant averred that the originating summons was misplaced, an afterthought, bad in law, an abuse of the court process and filed by a person lacking capacity to represent the estate of the late Kaburo Kiara.
3. In his testimony, the plaintiff adopted his witness statement made on 28.8.2016 as his evidence in chief. He told the court that the defendant sold to him two of his parcels of land namely LR No's. 829 & 741 in 1971 and relocated after receiving the consideration though the transfer for one portion was not affected. PW1 said that he took vacant possession, build a house and undertook various farming and development activities including connecting the suit premises with water and electricity.
4. Further, PW 1 testified that it was only in 2011 that the defendant's son visited the land and started claiming it was his ancestral land. He produced a copy of the record for LR No. 741 a s P. Exh No. 1. Cross examined by the defendant, PW 1 said that he had sued the defendant since the seller passed on though he could not tell if the defendant had any letters of administration for the estate of her late



husband. PW 1 told the court he entered the land in 1971 even though the sale agreement was made on 22.6.1977. PW 1 said that apart from the suitland the seller had previously sold and transferred to him Parcel No. 829 after the intervention of the area chief. PW 2 was Julius Kinyua a neighbor to the plaintiff. His testimony was that PW 1 was the sole occupant and purchaser of the suit land since his childhood now aged 65 years old.

5. In his defence the defendant adopted her witness statements dated 6.2.2020 and 24.11.2021 respectively as her evidence in chief and produced a copy of the records for LR No. 741 and submissions dated 27.5.2019 as D. Exh No. (1) & (2). DW1 said that the suit land belonged to her father M'Ikiara Kaburo M'Ikiara through her mother Kaburo M'ikiara. Her testimony was that she was the one utilizing the suitland even though she did live there. She could not however tell who was occupying the neighbouring land. DW 1 said that she was aged 101 years and inherited the land from her late mother known as Kaburo M'Ikiara.
6. At the close of the defence, parties opted with leave of court to file written submissions dated 26.10.2022 and 2.11.2022 respectively. The plaintiff submitted that his evidence had proved that his entry into the land was in 1971 following a sale agreement of the two parcels of land but the seller failed to transfer Parcel No. 741, which parcel he has occupied openly, notoriously, uninterruptedly, exclusively and with the knowledge of the defendant for over 12 years hence extinguishing the defendant's title to the land. Reliance was placed on *Virginia Wanjiku Mwangi vs David Mwangi Jotham Kamau* (2011) eKLR.
7. On the aspect of capacity, the plaintiff submitted that even though the defendant had admitted being the daughter of the deceased, and not the legal representative of the estate given her intermeddling with the estate, she ought to be a legal representative, more so, having transferred one portion and not the other to him.
8. Relying on *Esther Wangari Kihara vs Samuel Ndiba Senior & another* (2012) eKLR, *Panayotis Nkalays catravas vs Kanubhai Mohamed Ali Harji Banji* (1957) E.A 243 the plaintiff submitted that since the defendant was intermeddling with the estate without obtaining letters of administration, for purposes of Order 24 Rule 5 of the *Civil Procedure Rules*, she should be deemed as a legal representative of the estate and be substituted for the deceased.
9. The defendant on the other hand submitted that the suit was defective in law since she was neither the registered owner of the suit land nor a legal representative of the estate of the deceased, Kaburo Kiara as described in the pleadings. It was the defendant's submissions that the plaintiff failed to produce any sale agreement, and a grant showing that the defendant was an appointed legal representative of the estate of the registered owner of the suit land.
10. On the issue of intermeddling with the deceased estate raised in the written submissions, the defendant submitted that no evidence by way of a sale agreement was produced for this court to adopt the reasoning in *Esther Wangari case (supra)*. Regarding the sale agreement between the defendant and the plaintiff it was submitted that none was produced especially for 1971, the alleged date of sale.
11. Therefore, it was submitted by the defendant that since the registered owner obtained ownership in 1973 as per D. Exh (2) there was no way the plaintiff could have bought the land which was neither the defendant's nor for the registered owner at the time.
12. As to the true seller of the land, the defendant submitted that the witness statement dated 28.8.2014 seemed to suggest that it was the defendant who sold the land, put the plaintiff into possession and not the registered owner. Therefore, if this be true, the defendant took the view that the plaintiff ought to have sued the registered owner. Similarly, it was submitted the plaintiff had failed to prove the sale,



- its validity, its existence and whether the consideration was ever fully completed for a claim on adverse possession to suffice.
13. The defendant submitted that there was no prove by the plaintiff of the exact date of the entry, and the exclusive possession given her alleged possession and more importantly, when the plaintiff failed to produce any evidence by way of photographs or otherwise of the alleged developments and the manner of occupation.
  14. In sum, the defendant urged the court to find the suit defective, based on fabricated evidence, brought against a defendant who could not represent the estate of the registered owner and falling short of proving the ingredients of adverse possession.
  15. The issues for determination are:
    - i. Whether the defendant has capacity to be sued on behalf of the registered owner Kaburo Kiara said to be deceased.
    - ii. If there was a sale agreement between he plaintiff and the defendant.
    - iii. If the defendant had capacity to sell the land to the plaintiff and
    - iv. If the defendant could be liable for adverse possession for and on behalf of the registered owner.
    - v. If the plaintiff has proved the claim of adverse possession
    - vi. What is the order as to costs?
  16. The plaintiff sued the defendant describing her as a legal representative of Kaburo Kiara (deceased) who is the registered owner of LR Nyaki/Thuura/741 as per the copy of records produced as P. Exh No. I. In his supporting affidavit and the witness statements, the plaintiff averred that it was the defendant who sold to her the suit land and handed over vacant possession. One of the issues set in the plaintiff's list of issues dated 22.10.2019 was whether the defendant was the legal representative of the registered owner. At paragraph 3 of the defendant's memorandum of response dated 6.2.20220, she adamantly denied being a legal representative of the estate of Kaburo Kiara. This position was also repeated in the response to the case summary dated 6.2.2020. To confirm this position, the defendant produced D. Exh No.1. In cross examination however, DW 1 admitted that she was a beneficial owner of the suit land by virtue of inheritance from her late mother.
  17. It is trite law that the land of a deceased devolves to a legal representative after the issuance of a letters of grant or probate under the *Law of Succession Act*. Until a legal representative is possessed of letters of administration or probate a party lacks legal capacity to sue and be sued for and on behalf of the estate of the deceased. In the case of *Amos Weru Murigu vs Martha Wangari Kambi & another* (2009) eKLR, the court held that where a person was a beneficial owner of or was beneficiary entitled to but was not registered as an owner of land, the doctrine of adverse possession could not be invoked against him since a beneficial owner may not be in a position to effectively assert his or her title to the land and time could not run against such a beneficial owner.
  18. A legal representative under Section 2 of the *Civil Procedure Act* is a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character, the person in whom the estate devolves upon the death of the party so suing or sued, in law can only represent the estate of a deceased when a grant of representation has been made in respect of the *Law of Succession Act* following the procedure set therein.



19. Section 54 thereof as read together with the 5<sup>th</sup> Schedule at Paragraph 14 relates to a limited grant for pending suits or where the executor or person who is entitled to administration is unable or unwilling to act.
20. In this suit, the plaintiff has not substantiated the averment that the defendant is a bonafide legal representative to the estate of the registered owner Kaburo Kiara. No material has been presented before this court that the defendant herein is such a legal representative or whether the plaintiff took out citation proceedings in that regard against the defendant. The plaintiff instead has invited this court to deem the defendant as a legal representative by virtue of intermeddling with the estate of the deceased. Unfortunately, the court cannot accede to that request since there exists a clear procedure on how a party becomes a legal representative as outlined above.
21. Even after the defendant denied legal capacity to be sued, the plaintiff did not deem it fit to take out citation proceedings and or join the office of the Public Trustee to the suit to represent the estate of the registered owner.
22. Additionally, this court has no powers to determine who should or should not take out letters of administration and by extension matters relating to succession under Article 162 (2) (b) of the Constitution as well as the Environment and Land Act. This court cannot therefore purport to usurp a jurisdiction it does not have and whose mandate falls under a probate court.
23. It is trite law that the estate of a deceased person can only be represented in any legal proceedings by a person duly authorized to do so on behalf of the estate. It is only after the issuance of letters of administration can the legal representative exercise the powers set out under Section 82 of the Law of Succession Act, to enforce by suit or otherwise all causes of action surviving the deceased or arising out of his death. Such powers can only take effect after the grant is issued.
24. A suit filed against a person without legal capacity is null, void and incurably defective. Without a grant of letters of administration, a party dealing with a deceased property is an intermeddler by dint of Section 45 of the Law of Succession Act and is liable to criminal sanctions and answerable to the rightful administrator. In Juliana Adoyo Ongunga vs Francis Kiberenge Abano Migori Civil Appeal No. 119 of 2015, the court held that a party without *locus standi* in civil proceedings is equated to that of a court without jurisdiction.
25. Without a grant, the defendant herein cannot purport to represent the registered owner, no matter the family relationship which subsisted prior to her death. See Pravichandara Jamnadas Kakad vs Estate of Lucas Oluoch Mumia & 2 others (2022) eKLR. Consequently, and on that score alone, I find the suit against the defendant defective in law and hereby proceed to strike it out with costs.
26. Coming to the 2<sup>nd</sup> issue on whether the entry into the suit premises was as a result of a sale agreement, the plaintiff in his pleadings averred that he entered into sale agreements with the defendant who only transferred parcel No. 829 and not Parcel No. 741.
27. The plaintiff did not set out the terms and conditions of the sale agreement including how much the consideration was, the acreage sold and when he fully paid the total purchase price so that time for adverse possession could start running as held in Public Trustee vs Wanduru Ndegwa (1984) and Mbui Mukangu vs Mutwiri Mbui (2004) eKLR.
28. The plaintiff failed to produce copies of the register for Parcel No. 829 allegedly transferred to him by the then registered owner or the defendant herein. Whereas the plaintiff blamed the defendant for intermeddling with the estate of the deceased, no evidence was brought that the plaintiff cited the



defendant to take out letters of administration or lodged a complaint with the relevant offices for her intermeddling with the property of a deceased person.

29. In absence of the final date for the full payment of the purchase price, this court is unable to determine when the permissive entry terminated and time started running by virtue of adverse possession as against the registered owner and her successor in title.
30. Coming to the ingredients of adverse possession, a party claiming adverse possession must demonstrate *animus possidendi* and acts inconsistent with the rights of the registered owner which have been *nec vi nec clam* and *nec pricario*.
31. The plaintiff alleged that he has been in exclusive use and control of the suit land since 1971 up to 2011 when the defendant's son came to assert that the land was their ancestral property. Other than asserting occupation and possession, the plaintiff failed to produce tangible and cogent evidence of any developments undertaken on the land with the full knowledge of the defendant or the registered owner.
32. In her testimony, the plaintiff said that he was not aware of the whereabouts of the true owner after he sold the land to him and allegedly refused to transfer the land to him. The plaintiff was unclear on exactly whether he was dealing with the defendant or the registered owner.
33. In absence of evidence of both possession and occupation I find the claim for adverse possession unsubstantiated as against the registered owner. Similarly given the lack of *nexus* between the defendant and the registered owner, the defendant cannot be liable for acts of the registered owner and vice versa to found a claim for adverse possession.
34. The upshot is I find the suit not only incompetent against the defendant but also lacking merits. The same is dismissed with costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2023**

**In presence of:**

**C/A: Kananu**

**No appearance**

**HON. C.K. NZILI**

**ELC JUDGE**

