



**Muga (Being a legal representative of the Estate of Anita Karambu
M'Murunga – Deceased) v Mukiri (Environment & Land Case
323 of 2017) [2023] KEELC 18768 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18768 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 323 OF 2017**

CK NZILI, J

JULY 12, 2023

BETWEEN

**JULIUS KINOTI MUGA (BEING A LEGAL REPRESENTATIVE OF THE
ESTATE OF ANITA KARAMBU M'MURUNGA – DECEASED) PLAINTIFF**

AND

FESTUS RUBARA MUKIRI DEFENDANT

JUDGMENT

1. Through an originating summons dated 11.12.2017, the plaintiff urged this court to find her entitled to L.R. No. Abothuguchi/Ruiga/206 registered in the name of the defendant by virtue of adverse possession. The originating summons was supported by an affidavit sworn on 11.12.2017 by Anita Karambu M'Murunga in which she attached a copy of the record for the suit land as annexure marked DKM 1.
2. Following the death of the initial plaintiff, the originating summons was amended on February 20, 2023, and a new supporting affidavit was filed sworn by Julius Kinoti Muga on February 20, 2023 following letters of grant. Briefly, he stated that her mother was a second wife of the late Ayub M'Muga M'Itaru, who gifted him the suit land in 1950, which she continued to occupy alongside her six children. The amended originating summons was accompanied by a further list of witness statements dated April 4, 2023.
3. The defendant opposed the originating summons through a replying affidavit sworn on January 17, 2018, stating that he had inherited the land through Meru H.C. Succession Cause No. 177 of 1992 and became the registered owner on 15.4.1994, while the plaintiff lived on her husband's land L.R. No. Abothuguchi/Ruiga/33, with her son and where they still live.



4. The defendant averred that after his registration, the plaintiff registered a caution and, through force, entered the land, erected a timber house, and started living there by force only to institute Meru HCC No. 66 of 1998 and a Tribunal Case No. 33 of 2001, where she obtained a restriction order, both of which have never been prosecuted. He attached copies of the previous suits district officers' letter, demand letter, objection to water connection, and a copy of the death certificate for M'Murunga as annexures marked FRM "1" – 4, respectively. The replying affidavit was accompanied by a list of witness statements and documents dated November 20, 2018.
5. At the trial, Julius Kinoti Muga testified as PW 1. He adopted his supporting affidavit dated February 21, 2023, witness statement dated March 2, 2023, and her late mother's supporting affidavit as his evidence in chief. Further, PW 1 produced a copy of the extract to the title for L.R. No. Abothuguchi/Ruiga/206 as P. Exh No. (1) and a limited grant dated November 1, 2022 as P. Exh No. (2). He asked the court to cancel the title deed in the name of the respondent and replace it with his name since they had lived on the suit land since he was born to date and have made various permanent developments without objection or attempt to evict him and her family from the suit land.
6. In cross-examination, PW 1 told the court that his late father was Ayub M'Imunga, who passed on in 1998, while the 1st registered land owner was M'Murunga M'Mukamba, a grandmother to the defendant and himself. He insisted that the land was a gift to his late mother though not documented anywhere as the only daughter of the 2nd wife.
7. PW 1 admitted the existence of the previous suits, which could not proceed at the tribunal for non-appearance by the defendant. He could not tell the outcome of the earlier lawsuits. PW 1 clarified that entry into the land occurred in 1977, and by the time succession cause was filed without his knowledge, a caution existed against the title since November 5, 1997.
8. PW 1 told the court that he relocated to Muthaara Area in Tigania after the court stopped any new developments on the suit land though he had built a house in 2000 where his sister continues to occupy the land. PW 1 denied going against a court order to erect permanent structures on the land. Other than trying to decongest the house since her sister has a large family, which could not be accommodated in the small house, hence the expansion of the rooms. PW 1 further admitted putting some building materials on the suit land. PW 1, in re-examination, told the court his late mother was the only daughter of the original registered owners, and hence after her death, he buried her on the disputed land.
9. Joseph Gitonga testified as PW 2 and adopted his witness statement dated April 4, 2023 as his evidence in chief. His evidence was that the original registered owner was the grandfather of the plaintiff, who had only one son, the defendant's father, and the late Anita as the only daughter but initially married to M'Munga M'Itaru from the same village. PW 2 told the court that the late Anita Karambu had two homesteads, one she had inherited from her late father as her only daughter from the 2nd wife. He told the court that the dispute had been referred to a panel of village elders. As a member of the deceased clan, PW 2 notified the defendant that the land did not belong to him in vain since the deceased relative had occupied it alongside her children until their adulthood. Similarly, PW 2 told the court that neither the defendant nor his late father had settled on the suit land, so the villagers and clan elders said to him that his title deed was unlawfully obtained.
10. Festus Rubara Mukiri, the defendant, testified as D.W. 1. He adopted his replying affidavit dated January 17, 2018 as his evidence in chief. Further, he produced his documents per the list dated November 20, 2018, among them an Originating Summons dated June 23, 1998 as D. Exh No. (1) letter dated August 8, 2001 as D. Exh No. (2) Land Disputes Tribunal letter dated November 30, 2001 as D. Exh No. (2), letter dated July 21, 2018 to the water project chairman as D. Exh No. (3), death



certificate for M'Murugu M'Mukambu dated 16.8.1991 as D. Exh No. (4,) a confirmed letter of grant as D. Exh No. (6) and an official search certificate as D. Exh No. (7). He told the court that her sister initially occupied the land until she divorced and brought her mother to live there from her initial land parcel No. 33 belonging to her late husband, M'Imunya.

11. Further, D.W. 1 told the court that he had inherited the land from his father M'Mukiri, who passed on in 1989 without objection from the plaintiff or his five siblings. He could not tell the outcome of the several previous cases he had with his late aunt and the plaintiff mother, who had also placed a caution on the suit land in 1997. He denied the alleged occupation by the deceased over the land throughout her lifetime. In cross-examination, D.W. 1 admitted that his late grandfather had only two children, his late father and the plaintiff's late mother though in applying for letters of administration for his late grandfather's estate, he omitted disclosing the interests of her late aunt. D.W. 1 admitted that the land was never in his late father's name and, therefore, ordinarily, it should have devolved to the two immediate children.
12. D.W. 1 acknowledged that he had never sought to evict his late aunt from the land since 1994 when he became the registered owner. Further, D.W. 1 told the court that he had never occupied or developed the suit land since he was born, as well as his late father and late grandfather. D.W. 1 told the court that he had objected to the burial of their late aunt on the disputed land where her daughter Hellen who is also elderly, has been living with her grandchildren after she divorced from her husband. D.W. 1 also urged the court to grant him vacant possession of his land.
13. Nelly Kithure and Fredrick Mutwiri testified as D.W. 2 and 3, respectively. They adopted their witness's statements dated November 20, 2018 as their evidence in chief and confirmed that the late Anita Karambu was a daughter of the late M'Murunga M'Mukamba, the initial owner of the suit land.
14. D.W. 3 confirmed that the late Anita Karambu used to till the land gifted to her by his late grandfather, now owned by the defendant out of a succession cause. Moreso, D.W. 3 told the court that his late father had instructed the def to take over the suit land.
15. With leave of court, parties filed written submissions dated May 7, 2023 and May 24, 2023 respectively. The plaintiff submitted that his evidence pointed at a gift of the suit land to his late mother by his late grandfather as the only daughter, followed by possession and occupation for over 12 years to the exclusion of both the current registered owner and the predecessors in title openly, notorious without force, exclusively, continuously and with the intention of possessing the land.
16. Therefore, the plaintiff submitted that his claim governed by sections 7, 17, 18, 37 & 38 of the *Limitations of Actions Act* had crystallized. Reliance was placed on *Tabitha Waitberero Kimani vs. Joshua Ng'ang'a* (2017) eKLR, on the four ingredients of adverse possession. He urged the court to find that the land registration in the defendant's name on April 15, 1994, while he was still in the land, was subject to his accrued overriding rights under the law.
17. On his part, the defendant submitted that the late Anita Karambu was married off to one M'Muga M'Itaru as a second wife and lived on parcel LR. No. Abothuguchi/Ruiga/33 was not in the suit land until her daughter divorced in 1997 and forced her to move into it from her own land.
18. The defendant submitted that the evidence of PW 1 and PW 2 was inconsistent, hearsay on the alleged gift, and could not find the ingredients of adverse possession as set out in *Wambugu v Njuguna* (1983) KLR 173, *Alfred Welimo vs Mulaa Sumba Barasa* C. A 186 of 2011, *Mtana Lewa v Kabindi Ngala Mwangandi* (2015) eKLR, since there were interruptions by the plethora of earlier suits, the occupation has been by force due to the family chaos as indicated by PW 2, and his confirmation of grant was never challenged, annulled or revoked under section 76 of the *Law of Succession Act*.



19. The court has carefully reviewed the pleadings and evidence tendered, the written submissions, and the law cited. The issues calling for the court's determination are:
- i. Was the suit land family or clan land?
 - ii. How and when did the plaintiff enter into the suit premises?
 - iii. Was the plaintiff on the suit land by the time the land came under the defendant's registration?
 - iv. What has been the nature of the plaintiff's occupation on the suit land?
 - v. Has the plaintiff proved the ingredients of adverse possession to be entitled to the reliefs sought?
20. Adverse possession applies where an intruder lives on a true owner's land with no force, secrecy, openly, and notoriously with the true owner's knowledge, exclusively, as of right and for a statutory period of 12 years. See *Tabitha Waittherero Kimani* (*supra*), *Manason Ogendo Afwanda v Alice Awiti Orende & another* (2020) eKLR, *Wambugu v Njuguna* (*supra*), *Alfred Welimo v Mulaa Sumba Barasa* (*supra*).
21. In *Mtana lewa* (*supra*), the court observed that adverse possession occurs where the true owner neglects, omits, or defaults to take action against an intruder on his land for 12 years. In the case of *Kimani Ruchire & another v Swift Rutherfolds Co. Ltd & another* (1976) 80 1KLR 1500, held that dispossession and discontinuance must go together, and therefore where the use and enjoyment of the land were possible, there could be no dispossession if the registered owner enjoyed the land and also that if enjoyment and use were not possible, then dispossession for that period could not be possible. The court went on to list instances of possession to include fencing or cultivation, in a definite manner on the area and on time. Additionally, the court observed that the possession must be continuous, unbroken, or uninterrupted.
22. Applying the preceding principles to the instant suit, has the plaintiff proved his claim to the required standard? I think so. There is no dispute that the initial land owner, as per the copy of the records, was Murunga Mukaba going by the entry made on September 15, 1965 until the land came into the name of the defendant on April 15, 1994. After that, the late Anita Karambu put a caution on November 5, 1997, claiming a beneficial interest. Eventually, a restriction was entered by the deceased on July 17, 2001DW 1 admitted in his evidence that the suit land was never in the name of his late father, who, alongside the late Anita Karambu, were the then immediate beneficiary to the estate of Murunga Mukaba. Immediately, the deceased filed Meru H.C O.S. No. 66 of 1998. In the affidavit supporting the originating summons, she indicated that entry to the land occurred in 1952 following a gift by the registered owner. She asserted possession and occupation of the land to the exclusion of the previous owner, the subsequent registered owner, and the defendant.
23. In law, a grandchild can only inherit land from a grandfather if the immediate children of the deceased are no more or unavailable. D.W. 1 admitted that he did not involve the only surviving beneficiary of his grandfather's estate, the late aunt, in applying for letters of grant. Before the initial owner died on April 2, 1991, evidence of possession and occupation was not shaken. D.W. 3 admitted that their late aunt was tilling the land at the time, so by the time the defendant obtained a confirmed grant on April 12, 1994, the true owner had not during his lifetime given any notice to vacate or evict the plaintiff from the land. D.W. 1, in his evidence, has also admitted that his late father and grandfather had never utilized the land. He did not state who else was utilizing the land, if not the deceased and her family. The registration in the defendant's name did not stop the time running or dislodge the already accrued overriding interests in favor of the plaintiff and her family.



24. There was no evidence tendered that the plaintiff interrupted the time from running before, immediately and after he acquired a title deed and up to the time the suit was filed. Interruption can only be through an effective entry to the suit land to assert ownership, acknowledgment of the true owner by the adverse possessor, and or an eviction order. Courts have said that a demand letter does not amount to an interruption. The filing of the previous suit perse did not amount to disrupting the time from running. If anything, the plaintiff was asserting animus possidendi and seeking the court to confirm the accrued overriding rights on the title held by the defendant.
25. The defendant and his witnesses claim that their late father instructed him to take up the land and drive out the plaintiff. If the said father never asserted any rights over the land or applied for letters of grant against his late father's estate, then the true owner, what rights would he be transmitting and/ or passing to the defendant? There was evidence that the plaintiff was always on the land and caused several developments therein. There is no evidence that the defendant went over to assert ownership and remove or stop the plaintiff from entering, remaining, and or causing permanent developments therein.
26. In my view, therefore, entry into the land was not out of any permission or license by the initial owner and the successor to the title. Similarly, the plaintiff drove out and discontinued possession of the suit land's initial and subsequent owners. The evidence tendered by the plaintiff manifests the right to possess and occupy to the exclusion of the true owner's rights to use the land for the purpose for he intended in law.
27. I find the ingredients of adverse possession proved to the required standards and declare the plaintiff entitled to the suit land by virtue of adverse possession.
28. The defendant shall sign transfer forms in favor of the plaintiff within two months from the date hereof in default, of which the Deputy Registrar of this court shall execute them.
29. Costs to the plaintiff.
Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 12TH DAY OF JULY 2023**

IN PRESENCE OF

C.A JOHN PAUL

DEFENDANT

MOGENI FOR PLAINTIFF

KAUMBI FOR DEFENDANT

HON. CK NZILI

ELC JUDGE

