



Kungania (Suing as the Legal Representative of the Estate of M’kungania M’bagine - Deceased) v Rinkanya (Sued as the Legal Representative of the Estate of Gladys Kathuni M’rinkanya – Deceased) (Environment & Land Case 22 of 2019) [2022] KEELC 14520 (KLR) (2 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14520 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 22 OF 2019**

CK NZILI, J

NOVEMBER 2, 2022

BETWEEN

BONIFACE MUTWIRI KUNGANIA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF M’KUNGANIA M’BAGINE - DECEASED) PLAINTIFF

AND

JAPHETH KIRIMI RINKANYA (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GLADYS KATHUNI M’RINKANYA – DECEASED) DEFENDANT

JUDGMENT

1. By an amended originating summons the plaintiff suing on behalf of the estate of M’Kungania M’Bagine alias Samwel Kungania seeks to be declared as entitled to 1.98 ha out of LR No Abogeta/ Upper Chure/517 held by the defendant, a legal representative of the estate of Raiji s/o Gataara alias Raiji Gataara alias M’Raiji Gatara by virtue of adverse possession.
2. The summons is supported by an affidavit of Boniface Mutwiri Kungania in which he has attached a copy of a grant, judgment in Meru Succession Case No 107 of 1998 for the defendant’s estate, official search for the suit land and a bundle of licenses for electricity connection as annexures marked BMK 1-4 respectively.
3. The originating summons is opposed a replying affidavit sworn by Gladys Kathuni M’Rinkanya and Japhet Kirimi M’Rinkanya. Through an acknowledgement that there was a permissive entry as per a sworn affidavit dated May 29, 2007, the defendant stated there was a stoppage order as per the ruling and judgment in the succession cause. She urged the court to find the suit prejudicated since no appeal had been proffered against the said orders by the plaintiff. Further the defendant stated that the



- plaintiff was a tenant at will who should be evicted from the land since the confirmation of grant had already been affected. The defendant attached the aforesaid documents as annexures marked GKR 1-4 respectively. Similarly, the defendant also filed a notice of preliminary objection dated June 13, 2019 on the basis that the suit was *res judicata*.
4. Following pre-trial directions parties filed paginated bundles of documents dated December 1, 2021 and November 22, 2021 respectively and set out the issues for determination at pages 68 and 33 in the aforesaid bundles.
 5. The plaintiff told the court he was bringing the suit for the estate of his deceased father as per the letters of administration issued to him against the defendant who is also a legal representative of the estate of his deceased grandfather. He adopted his supporting affidavit as his evidence in chief and produced the copies of the letters of grant and search certificate as PExh No's 1, 2 & 3, business receipts as PExh No (4) as contained at page 4a – 64 of the plaintiffs bundle of documents which included electricity licenses, photographs and a search certificate as PExh No (5).
 6. The plaintiff testified that it was his late father who was using the land from 1960 together with his family. PW 1 said he was born on the said land in 1978 and the family had over the years undertaken many developments thereon. In his view, there had been no interruption on both possession and occupation since the defendant's grand father passed on in 1969. He denied that the late Gladys Kathuni together with her mother ever occupied the land.
 7. PW 1 acknowledged that his late father had filed a succession case. Further, he denied there was any contradiction of the evidence tendered in the succession case as given by his uncle Jamleck Ntoithima which may have led to the probate court making adverse findings against his late father's claim. In addition, PW 1 said even the late Gladys Kathuni acknowledged his late father was utilizing the land during the probate case, he was never on the land as a tenant.
 8. The defendant adopted the replying affidavits sworn on June 25, 2019 and November 18, 2014. He denied that the plaintiff's deceased father ever occupied the suit land since his late mother was the one using the land until she became sickly.
 9. He produced a replying affidavit by Charles Mwititi dated May 29, 2007 as PExh No (1), an order issued on May 25, 2007 as PExh No (2), copy of ruling and judgment in the probate court as DExh 3 and (4) respectively.
 10. The defendant admitted that the plaintiff had been utilizing the land for over 12 years. He said that even though an eviction order was issued in CC No 90 of 1998, it was abandoned after this suit was filed but the former suit was yet to be prosecuted. Further, the defendant admitted he had not raised a counter claim in this suit for eviction orders but insisted after this suit was over, he was still at liberty to seek for such prayers.
 11. DW 1 said that during the succession cause, her late mother had said that the plaintiff was utilizing the land and given the orders in 2000 stopping any developments thereto by Hon. Justice Kasanga Mulwa, any developments thereafter as per the photos produced must have been done during the pendency of this suit. DW1 however said that the defendant did not pursue any contempt proceedings for disregard of the court orders.
 12. Further, DW 1 insisted that they followed the law and obtained a confirmation of grant so that the land could be transmitted to them and that the succession court had conclusively determined the ownership of the land since there was an admission by Charles Mwititi that the plaintiff entered the land with the permission of the defendant's family hence could not turn around and claim adverse possession.



13. The plaintiff submitted that if there was any license, which is denied, the same was cancelled before the death of the late Raiji in 1969 and if at all the land was left for the late Gladys Kathini to utilize, she never took possession from the plaintiff until she also passed on. Therefore, in absence of any eviction order by the late Gladys Kathini with effect from 1969, the 12 years lapsed in 1981 and therefore under section 16 of the [Limitation of Actions Act](#), death did not stop time from running.
14. As regards the assertion that the late Gladys Kathini and her mother used the land before she died in 1987, the plaintiff submitted no such evidence was produced up to 1987 and until 2019 when the defendant filed a suit to recover the land making a cumulative total of 32 years of occupation. The court was urged to find the plaintiff has occupied the land throughout which fact was also acknowledged in the probate cause.
15. The defendant has submitted that in the succession cause, the plaintiff had based the claim on gift intervivos which was rejected in the final judgment but has not appealed against.
16. The defendant relied on [Gabriel Mbui vs Mukindia Maranya](#) (1993) eKLR, [Samuel Miki vs Jane Njeri Richu](#) C/A No 122 of 2001, [John Ndungu Kipsoi vs Samuel Chepkulul & another](#) (2018) eKLR, [Mwaingi Hamis Ali vs AG & Philemon Mwaisaka](#) Civil Appeal No 125 of 1997, [Lil Kisii Safari Inns Ltd & 2 others vs Deutsche Investment Und Enwicklogs Jellschatt Deg & others](#) (2011) eKLR & [Local Government for Good Governance and 6 others vs CECM Finance & Economic Planning County Government of Mombasa & 2 others](#) (2021) eKLR on the proposition that the ingredients of adverse possession are distinct and must be proved separately, the intruder must not be a licensee or through a consent and that equity will not suffer a wrong without a remedy.
17. Further, the defendant urged the court to find the plaintiff's case was unsustainable since he only wants the land for himself as his other siblings were settled elsewhere by their late father; judicial pronouncements were public documents by virtue of sections 79 of the [Evidence Act](#) and prior decisions were binding as to the issue of ownership and that the evidence of the plaintiff had failed the threshold under section 107 of the [Evidence Act](#).
18. The issue for courts determination are:
 - i. If the suit in *res judicata*
 - ii. If the plaintiff has met the ingredients of adverse possession.
 - iii. If the plaintiff is entitled to the prayers sought.
19. A party seeking orders of adverse possession has to plead and prove the concepts of dispossession and discontinuance of possession by the registered owner.
20. In the [Presbyterian Church of East Africa \(Uthiru Church\) & another vs Kihoro & 3 others](#) (Civil Appeal 303 of (2018) (2022) KECA 49 (KLR) (judgment), the court held that adverse possession is anchored on sections 7, 13, 17 & 38 of [Limitations of Actions Act](#) whose combined effect is to extinguish the title of a proprietor of the land in favour of an adverse possessor at the expiry of 12 years in adverse possession of the property in question.
21. The law and requirements for adverse possession were laid down in the case of [Titus Mutuku Kasuve vs Mwaani Investments Ltd & 4 others](#) (2004) eKLR, the court said:

“In order to be entitled to land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period



of twelve years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

22. In *Mbira vs Gachubi* (2002) IE ALR (37) it was held that:

“..... A person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non – consensual, actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption”.

The court held while citing with approval *Alfred Welimo vs Mulaa Sumba C/A No 186 of 2011* held that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it without demonstrating a possession inconsistent with the title of the owner such as the taking of possession of land with the intention to possess and assert rights in conflict with those of the owner of the land. The court held that by entering the suit land and erecting a semi-permanent church thereon the appellant had demonstrated their intention to possess the same which church eventually became permanent and was even in existence at the time of the hearing.

23. As to interruption of possession the court cited with approval *Githu vs Ndeete* (1980) eKLR that;

“Time ceases to run under the Limitation of Actions Act either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings to make an effective entry into the land”.

24. In my view, the giving of notice to quit cannot be an effective assertion of rights for the purpose of stopping the running of time.

25. The court citing with approval Kwach JA in *Joseph Gachumi Kiritu vs Lawrence Munyambu Kabura* (1996) eKLR;

“I agree that the mere filing of a suit for recovery of possession may not disrupt the possession of adverse possessor, it being a physical thing, but as regard the stopping of time for purpose of the act I would fully subscribe to the position exposed by Potter JA in *Githu vs Ndeete*.....”.

“Instead of going in the disputed land armed to dislodge the adverse possessor on act which can only result in a serious breach of the peace or even loss of life”.

26. In the *PCEA (supra)* the Court of Appeal held that time stopped to run when a suit was filed which is a first step to assert rights over the suit property.

27. Applying the above principles to this suit, the plaintiff has pleaded that the entry into the suit, land occurred in 1960 before the then registered owner passed on in 1969 and the land passed to the late Gladys Kathuni, the mother of the defendant who has pleaded and testified that the deceased under whose estate the defendant claims, was there with permission as a tenant or as a licensee which permission was withdrawn prior to the demise in 1969.

28. On the other hand, the plaintiff testified that if any license ever existed, the same was extinguished by the death of the late father in 1969 and hence thereafter he continued to occupy the land as an adverse possessor until 1987 when Gladys Kathuni passed on, without any interruptions or notice to vacate and so by the time the order to stop was applied for in 2019, the possession and occupation was for over 32 years hence the adverse rights had matured.



29. To counter this, the defendant testified that there was always, assertion of rights by the defendant which culminated into an order stopping any developments there to which the plaintiff disobeyed and continued to build more structures.
30. Further the defendant has testified that the assertions of ownership by the plaintiff were determined to finality in the succession cause hence this suit is *res judicata*, an abuse of the court process and lacking merits.
31. Starting with the issues of *res judicata* in [*Josephine Wambui vs Margaret Wanjiru Kamau & another*](#) (2013) eKLR, the Court of Appeal stated; “We hasten to add that the Law of Succession Act is a self-sufficient Act of parliament with its own substantive law and rules of procedure.”
32. In [*John Florence Maritime Services Ltd vs Cabinet Secretary for Transport & Infrastructure & 3 others*](#) (2015) eKLR the Supreme Court of Kenya stated for the doctrine of *res judicata* to apply, the suit or issue must have been directly and substantially in issue in the former suit; between the same parties or between the same parties under whom or any of them claims litigating under the same title in the former suit and before a competent court to try the subsequent suit or suit in which the issue is raised.
33. Rule 41 (3) of the [*Probate & Administration Rules*](#) provides that when a question arises as to the identity, share or estate of any person claiming to be interested in or of any condition or qualification attaching to such share or estate which cannot at that stage be conveniently determined, the court may prior to the confirmation of the grant and subject to section 82 of the Act, set aside that particular share or estate or the property comprising it to abide by the determination of the question in proceedings under order 36 rule 1 of the [*Civil Procedure Rules*](#).
34. While expounding on this point, Musyoka J in [*Re-estate of Alice Mumbua Mutua \(deceased\)*](#) 2019 eKLR said that disputes between the estate and third parties need not be determined within the succession cause since the legal infrastructure in place lies elsewhere and a Probate Court lacks such powers. The court held the primary mandate of a probate court is distribution of the estate of the deceased.
35. In [*Monica Wangari Njiiri & 4 others vs Eunice Wanjiru Igamba & another*](#) (2016) eKLR it was held that succession proceedings are not the appropriate way to challenge the title of the deceased to the said properties and a claim of trust ought to be a subject matter of a separate suit or proceedings.
36. [*In re Estate of Nchogu Sagana \(deceased\)*](#) (2021) eKLR the court held matters relating to the occupation and proprietorship of the subject land did not fall within the jurisdiction of the probate court.
37. The overlaps on the pathways of the probate court and the ELC courts was clarified by the Court of Appeal in Appeal [*Githegi vs Mwaura*](#) (Civil Appeal 216 of 2016 (2022) KECA 466 (1KLR) (March 18, 2022) judgment.
38. This court vide a ruling dated April 30, 2020 has already made a finding the issues of adverse possession were not determined by the probate court. Suffice it to restate that the two courts have distinct mandates. Though issues may overlap in the two courts, rule 41 aforementioned is clear on what the court should do while faced with such a scenario.
39. Coming to the next issue, the plaintiff has pleaded and testified that the entry into the suit premises occurred in 1960 before the passing on of the defendant’s grandfather in 1969, grandmother in 1987 and his mother in October 20, 2019.



40. This fact is admitted by the defendant in the previous proceedings as per DExh 4, PW3 have also confirmed that the plaintiff and his deceased father had been possessing, developing and utilizing the suit land since 1960 to present.
41. As to whether the possession has been open, without force and in exclusion of the registered owner, a copy of the official search indicates that the late Raiji s/o Gataaru became a registered owner on 1963. As at September 21, 1998 when the deceased M’Kungania M’Ibage filed Meru Succession Case No 107 of 1998, he had been dead for 29 years. The plaintiff has produced licenses dating back to 1980’s showing that he had been authorized to undertake business on the suit land by the relevant county councils. There is no indication that prior to 1998, the defendant had interrupted the said occupation and or stopped the permanent developments appearing therein. The plaintiff has produced receipts, trade and occupation licenses for service charge and caterers’ licenses by the then Meru County Council.
42. The plaintiff went to an extent of not only asserting his occupation rights but also enforcing them by applying for letters of administration as a beneficial owner of the suit land. Other than the succession case which was determined on January 28, 2019, there is no indication if the defendant has sought for and applied for full grant.
43. Similarly, there is no evidence on whether the defendant asserted his rights by either an effective entry, by] retaking of possession or enforcing the eviction order issued against the plaintiff.
44. As at the time the defendant moved to court, already the rights of the plaintiff had accrued against the predecessor in title as well as the defendant herein.
45. The upshot is that the plaintiff has proved the claim to the required standard and the court proceeds to find him entitled to the orders of adverse possession over a portion of LR No Abogeta/Upper Chure/1517 measuring 1.98.
46. The defendant shall effect the transfers in favour of the plaintiff within 2 months from the date hereof in default the deputy registrar to sign the necessary documents. Costs to the plaintiff.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 2ND DAY OF NOVEMBER, 2022

In presence of:

C/A: Kananu

Murira for Mwenda Mwarania for plaintiff

Karanja for defendant

HON. C.K. NZILI

ELC JUDGE

