



Mboroki & 2 others (Suing as the Chairman, Secretary and Treasurer, respectively, of Runogone Water Project) v Githu (Sued both in a personal capacity and as the legal representative of the estate of the Late Robert Githu Mwangi (Deceased) (Environment & Land Case E012 of 2023) [2024] KEELC 66 (KLR) (17 January 2024) (Judgment)

Neutral citation: [2024] KEELC 66 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E012 OF 2023**

CK NZILI, J

JANUARY 17, 2024

BETWEEN

JACKSON MWORIA MBOROKI 1ST PLAINTIFF

CHARLES KABURU NDEGWA 2ND PLAINTIFF

NAHASHON GICHUNGE RINGERA 3RD PLAINTIFF

**SUING AS THE CHAIRMAN, SECRETARY AND TREASURER,
RESPECTIVELY, OF RUNOGONE WATER PROJECT**

AND

**NANCY WANGARI GITHU (SUED BOTH IN A PERSONAL CAPACITY AND
AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE ROBERT
GITHU MWANGI (DECEASED) DEFENDANT**

JUDGMENT

1. The plaintiffs commenced this claim through an originating summons dated 23.6.2023. As the chairman, secretary, and treasurer of Runogone Water Project, they asked this court to declare that they own L.R No. Nyaki/Kithoka/3024, measuring 0.005 ha under adverse possession.
2. At the hearing, PW1 testified that the water project is registered under the Social Services Department and has existed since 1970. The plaintiffs told the court that in early 1970, they built a concrete water reservoir and or tank on the suit land when the registered owner was the late Robert Githu Mwangi, now represented by the defendant as a legal representative. Testifying through PW 1, the plaintiffs told the court that project members have an outlet connection from the water tank whose overflow would be contained by the project's bananas planted on the lower side of the suit land.



3. PW 1 said that the land was a partition of L.R. No. Nyaki/Kithoka/2503, which was under the name of Robert Githu Mwangi as of 20.12.2007 and eventually came under the defendant's name on 12.9.2022, as per the copy of records, following a grant of letters of administration and a confirmation of the grant. The plaintiffs produced a copy of the certificate of registration, a copy of the records, a copy of the grant and its confirmation, notice to vacate the land dated 25.11.2022 a search certificate, and proceedings and award in Meru Land Dispute Tribunal No. 57 of 2007 as P. Exh No. (1), (2), (3), (4), (5), (6) and (7) respectively.
4. The plaintiffs told the court they had erected public water reservoirs on the land and planted bananas and arrow roots to prevent soil erosion or water runoff from the tank. The plaintiffs averred and testified they have been in open, uninterrupted and continuous use, occupation and possession of the suit land since 1972, even before the deceased and the successor in the title became the registered owners of the land.
5. Further, the plaintiffs said the dispute was handled at the Land Disputes Tribunal Case No. 57/2007, where they had complained against Cecilia Nkatha, Anthony and the deceased, among others, after the 1st respondent sold the land to the late Robert Githu Mwangi.
6. PW 1 told the court that the initial owner, M'Mutugi, had admitted at the tribunal that he had allowed the project to be erected on his land. In addition, PW 1 told the court that the deceased's wife, Cecilia Nkatha, was emphatic that she had not sold the portion in dispute to anybody. Further, PW 1 clarified that even Robert Githu Mwangi confirmed before the tribunal that the water tank existed before he bought the land near the water tank. His view was that the tribunal found that the water project lawfully occupied 1/8 of the suit land. P.W. 1 insisted the defendant had never taken possession of the suit land. In cross-examination, PW 1 told the court that the water project was legally in existence since it was registered with the Social Services Department and the ministry of water as a self-help group, though they lacked quarterly annual returns as required by P. Exh No. (1) and conditions No. (a) – (e). PW 1 also stated that the land dispute tribunal award was never adopted as a court decree.
7. PW 1 said the deceased widow acknowledged the developments on the suit land in paragraphs 3 and 18 of P. Exh No. 7. Similarly, PW 1 clarified that the water project on the suit land was known to the defendant per paragraph 7 of her replying affidavit. He denied that their occupation was through force or stealth, as alleged by the defendant.
8. PW 1 clarified, however, that it was common knowledge to the community that the water installation should be safeguarded to avoid vandalism and interference. Additionally, PW 1 indicated the defendant has never sought the recovery of the suit land or tried to evict them from the land since 1972.
9. In defence of the claim, the defendant relied on a replying affidavit sworn on 16.8.2023. As the legal representative of the late Robert Githu Mwangi's estate, she told the court she acquired the land through transmission following a certificate and confirmation of the grant. She produced a certificate of grant, a chief's letter dated 18.7.2022 and a demand letter as D. Exh No. (1), (2) & (3), respectively. Her evidence was that the land initially belonged to her late husband and that the plaintiffs had erected a water tank at the edge of the land.
10. D.W. 1 told the court she was not opposed to the land occupied by the water tank. She said the portion behind the water tank where the plaintiffs had alleged established a garden belonged to her. Further, D.W. 1 said that though there was an access road to her land next to the tank, it had been blocked by kiosks erected in front of the water tank.
11. D.W. 1 said she could not access her land from the front due to the existing illegal structures and the presence of goons. She said she had made a report to the area chief as per D. Exh No. (2), hence why she



- mentioned violence in the demand letter. In cross-examination, D.W. 1 admitted the plaintiffs filed an Land Disputes Tribunal case against her late husband, whose outcome was never challenged on appeal. Further, D.W. 1 clarified that her late husband bought the land from Cecilia Nkatha, a witness before the Land Disputes Tribunal.
12. While admitting that the LDT found that the plaintiffs entitled to 1/8 of an acre of the suit land, she said it could not have been fair; otherwise, the water project would have taken up all her land since the acreage was the same size. D.W. 1 told the court the initial land was L.R. No.2503, whose owner had failed to excise the portion occupied by the water tank in favour of the plaintiffs.
 13. D.W. 1 said her late husband jointly owned the land with Robert Mwesigwa. She said the water tank existed when her late husband bought the land. Even though she made a report to the area chief, D.W. 1 said she never sought an injunction or brought a recovery suit for the land against the plaintiffs or eviction following the expiry of her notice to vacate the land.
 14. The parties, following directions, filed written submissions dated 7th & 8th December, 2023. The plaintiffs submitted that form the copy of record and grant produced as P. Exh No. (2) & (3) (a) & (b), the late Robert Githu Mwangi became the registered owner of the suit land on 20.12.2007, whereas the defendant was recorded as the owner on 18.7.2022. Going by P. Exh No. (1), registration of the project occurred on 26.1.1995 while the water tank was erected in 1970; it means, therefore, the possession of the land by the water project preceded the defendant and her predecessor in title and the resultant subdivisions of the land into L.R. No's.3023 and 3024, as per P. Exh No. (6).
 15. The plaintiffs submitted they had dispossessed the defendant of the use and the occupation of the suit land and openly undertaken developments thereon, of which adverse acts were evidenced as early as 22.1.2008. Further, the plaintiffs submitted that the defendant had admitted that she had not utilized the land for long.
 16. The plaintiffs submitted that none of the title holders to the land had attempted to regain possession or seek eviction orders for over 16 years, including the deceased, who became a registered owner on 20.12.2007.
 17. Therefore, the plaintiff submitted under Section 16 of the *Limitation of Actions Act* (Cap 22) by the time the deceased died on 15.3.2018 up to 15.3.2022 when the defendant acquired letters of administrator time for adversity under Section 16 thereof was never interrupted.
 18. The plaintiffs submitted that they were entitled under Section 38(1) of the *Limitation of Actions Act* to apply for registration as trustees for the water project. The plaintiffs submitted that under Sections 28 (b) of the Act, the registration of the defendant as the owner did not affect their right since such registration was subject to the accrued rights under Sections 7 and 38 thereof.
 19. The defendant submitted that nothing was produced to show the renewal of the certificate of registration dated 26.1.1995 at the filing of the suit; hence, the suit should be found incompetent ab initio.
 20. On the claim of adverse possession, the defendant submitted the essential prerequisite as set in *Mtana Lewa vs Kahindi Ngala Mwangandi* (2005) eKLR, had not been met by the plaintiffs since the alleged occupation has not been peaceful, continuous and uninterrupted.
 21. The defendant submitted in paragraphs 6,7,8 and 9 of her replying affidavit that there was evidence of occupation through violence and intimidation, which was never rebutted by PW 1.
 22. The defence submitted a notice to vacate the land that had been served before the filing of the suit, after which the plaintiffs were summoned to the assistant chief's office, which was a clear manifestation



- of interruption. Reliance was placed on Edwin Juma Lumbasi & another vs Julius Naibei (2019) eKLR.
23. Additionally, the defendant submitted before the suit was filed that her late husband had asserted ownership of the suit land but was only prevented from occupying and utilizing the land through force and intimidation employed by the members of the water project.
 24. The issues calling for determination are:-
 - i. If the plaintiffs have pleaded and proved adverse possession.
 - ii. If the plaintiffs are entitled to the reliefs sought
 - iii. What is the order as to costs?
 25. A party seeking adverse possession has to establish two key concepts: dispossession and discontinuance of possession of the registered owner of the land. See N'gati Farmers Cooperative Society vs Ledidi & 15 others (2009) eKLR.
 26. Dispossession means the adverse possessor coming in and driving out the person in possession from the possession of the land, while discontinuance occurs when the person in possession goes out and is followed into possession by the adverse possessor. See Wanje vs Saikwa (1984) KLR 288.
 27. In Mbui vs Maranya (1993) eKLR, the court said a person relying on the statute of adverse possession must prove that he was in exclusive possession and that the true owner was out of possession for a clear actual possession for 12 years.
 28. In Mtana Lewa (supra), the court said adverse possession occurs when the person holding title to land omits or neglects to take action against the intruder for 12 years, the essential prerequisites being that the possession of the adverse possessor as night with force or stealth nor under the license of the owner which must be adequate in continuity, in publicity and to an extent it is adverse to the title owner.
 29. Further, in Wambugu vs Njuguna (183) KLR 173, the court observed that the best way to assess proof of adverse possessor was not whether or not the title holder has been disposed of or has discontinued his possession and not whether or not the claimant has proved that he or she had been in possession for the requisite 12 years.
 30. Regarding the actual owners in Wilson Kazungu Katana and others vs Salim Abdallah Bakshwein & another (2015) eKLR, the court said the land must be registered in the name of the person other than the applicant.
 31. On assertion of title in Leonola Nerima Karani vs William Wanyama Ndege (2012) eKLR, the court cited with approval Ng'ati Farmers Cooperative Society vs John Ledidi (supra) that dispossession means demonstrate the existence of acts which are inconsistent with the enjoyment of the soil for the purpose for which the true owner intended to use the land.
 32. Further, in Githu vs Ndeete (1984) KLR 776, the court said the mere change of ownership of land occupied by an adverse possessor did not interrupt such adversity since after acquiring rights under Section 7 of Cap 22 such rights were overriding rights under Sections 30 (f) of Cap 300 (repealed). The court also said time ceases to run under cap 22 either when the owner takes or asserts his right when the adverse possessor admits his right, takes legal proceedings or makes an effective entry into the land.
 33. Additionally, the court said giving notice to quit was not an effective assertion of a right to stop time from running. In Leonola Nerima Karani (supra), the court further said mere administrative action



- through the area chief and the writing of letters was not a sufficient move to oust action anchored on adverse possession.
34. Having set the governing law and principles distilled from precedents on adverse possession, a question was raised as to whether the plaintiffs have locus standi to sue in this matter. In answer to this, the plaintiffs produced P. Exh No. 1, registered on 26.1.1995, as a Runogone Water Project by the Ministry of Culture and Social Services. The defendant has attached the certificate since it has not been renewed as of a filing of the suit. In the demand letter dated 25.11.2023 produced as D. Exh No. (3), the defendant addressed the same to the chairman, secretary and treasurer of the Runogone Water Project, alleging that they had trespassed into the suit premises and put up illegal structures on the land.
 35. In paragraph 6 of the replying affidavit, the defendant averred that though the plaintiffs had remained in occupation of the suit land, the same was through violence, force and intimidation.
 36. Further, in paragraphs 7, 8, 9, 10, 11 and 13, the defendant averred that in 2015, members of the water project issued threats and chased her late husband from the suit land; one of them, Mr. Kaimenyi, a member of the water project. So, the plaintiffs' lack of capacity to sue was never pleaded or raised as a preliminary issue.
 37. In *Shadrack Mwamuu Nzioka & others suing as officials of Crescent Self-Help Group vs Tropical Bloom Ltd* (2020) eKLR, an issue had been raised that the plaintiff had no locus standi or authority to sue in a representative capacity under Order 1 Rule 13 and Rule 13 (1) & (2) of the Civil Procedure Rules. The court cited with approval *Kahindi Katana Mwango & another vs Cannon Assurance (K) Ltd* (2013) eKLR that Order 4 Rule 4 of the Civil Procedure Rules requires a party to state the capacity in which he sues. The court observed that the plaintiff in the suit had averred that they were suing on their own behalf. Therefore, the court said the suit was properly before it on behalf of the three plaintiffs, claiming ownership; otherwise, if it was a representative suit, the group members should have given the plaintiffs written authority to plead, appear and act on their behalf. In this suit, the plaintiffs have pleaded that their officials of the Runogone Water Project acting as trustees.
 38. The legality of self-help groups was considered in *Kipsiwo Community self-Help Group vs AG and 6 others* (2013) eKLR. The court said self-help groups were not incorporated bodies, and the government had not put in any legal framework to register and manage them. The court said they lacked the legal personality to institute proceedings under their name. Further, in *Senti Kumi Community Self Help vs Kenya Maritime Authority & another* (2019), eKLR, Yano J struck out a petition filed by the petitioner under its name for lack of capacity to sue.
 39. To my mind, I think the plaintiffs have defined the capacity they have sued the defendant as officials and trustees of the Runogone Water Project under a certificate of registration issued on 26.1.1995. See *Voi Jua Kali Associates vs Sange & others* (2002) 2 KLR 474. The official certificate of search dated 24.3.2023 clearly shows the plaintiffs had placed a restriction on the title on 2.3.2023 for and on behalf of the Runogone Water Project.
 40. A court of law should not strike out a suit unless it is hopeless or beyond redemption. See *DT Dobie & Co. (K) Ltd vs Joseph Mburia Muchina & another* (1980) eKLR.
 41. The non-renewal of the registration certificate was not pleaded as a bar to the plaintiffs' inability to sue and maintain the claim. See *Daniel Nzioki Kiangi & others vs Priscilla Musili & others* (suing on their own behalf & as officials) of Metha self-help group (2021) eKLR. Articles 22 and 258(1) of [the Constitution](#) have expanded the definition of a person to include incorporated bodies.
 42. Regarding the ingredients of adverse possession, there is no dispute that the entry into the suit premises occurred before the defendant and her deceased husband became the registered owners. This



is confirmed in P. Exh No. 7. The record shows that the water project was established in 1974. Evidence indicates that the deceased M'Mutungi was given an iron sheet tank in exchange for the land. This was confirmed by the widow Cecilia Nkatha Anthony, who said she sold a portion measuring 0.08 ha to one Mwangi but left out 1/8 of an acre occupied by the water tank. The Land Dispute Tribunal's findings were that the Runogone Water Project was started in 1973. Evidence in judicial proceedings can be used in subsequent proceedings. See *Central K Ltd vs Trust Bank & others* (1995-98) 2 E.A 52. P. Exh No. 2 shows that the defendant and the deceased husband became registered owners of L.R No. 3024 on 22.9.2022 and 20.12.2007, respectively. The register for L.R No.3024 measuring 0.05 ha was opened on 30.12.2007 as a subdivision of L.R No. 2503.

43. Section 32 of the [Limitation of Actions Act](#) defines an easement as acquired, among other things, where any way or watercourse or the use of any water has been enjoyed as an easement or any other easement that has been enjoyed peaceably and openly as of right and without interruption for 20 years, the right to use and access such way or watercourse or use of water to such other easement as absolute and indefeasible.
44. Sections 28 of the [Land Registration Act](#) provides that the land shall be subject to overriding interests as may, for the time being, subsist and after the same without being noted in the register, including rights of way, rights of water, natural rights or light, air water and support. Easements and analogues rights may be created under Sections 98-100 of the Act. In *Kamau vs Kamau* (1984) eKLR, the court defined an easement as a convenience to be exercised by one land owner over the land of a neighbour without participation in the profit of that other land, the tenant to which it is attached to the dominant and other on which it is imposed as the servient tenement. See *Magiri Nguthati vs Gideon Kimathi M'Nguthati* (2018) eKLR.
45. Section 138 of the [Land Act](#) provides that an easement burdens the servient land and runs with the land for the same period as the land or lease held by the grantor who created that easement. Sections 28 (1) of the [Land Registration Act](#) provides pipelines, wires, and dams erected, constructed, or laid in pursuance or under any power conferred by any written law as overriding interests that subsist and affect the land.
46. In *Kenya Power Lighting Company vs Mosiara Trading* (2016) eKLR, the court observed that the defendant had a right to safeguard a wayleave and that a right to own land may be defeated by operation of the law under Sections 138, 143 and 145 (1) of the [Land Act](#). See also *KPLC vs Kipevu Inland Container EPZ Ltd* (2018) eKLR, *James Ngugi Mbugua & another vs Grace Wairimu Mwithiga* NRB Civil Case No.1 174 of 2002 (O.S.).
47. Adverse possession does not apply where there is an easement over government land or land otherwise enjoyed by the government water vested in the government by the [Water Act](#). Can an easement amount to adverse possession? The issue arose in *Benina Ndugwa Kunyumu and others vs National Land Commission* (2015) eKLR. The court said that in adverse possession in acquiring an easement by prescription, the goal is not to acquire title to property but an easement. The court said if one uses rather than possesses the land of another openly, adversely, continuously and uninterruptedly, one acquires an easement and can continue to use that land. The court observed that prescription was a non-possessory interest in land through long and continuous use for 20 years, which, under Section 32 (1) (c) of the [Limitation of Actions Act](#), becomes absolute and indefeasible.
48. In *Solomon Muathe Mitanu & 787 others vs Nguni Group Ranch* (2017) eKLR, the court cited with approval *Kweyu vs Omuto* (1990) KLR 709, that possession in an adverse possession claim was a matter of fact while the question of whether that possession is adverse was a matter of legal conclusion to be drawn from the finding of facts.



49. Looking at the totality of the evidence produced by the parties, what was contemplated was an easement in the first instance. In *Brooke Bond (K) Ltd vs James Bill* (2013) eKLR, the court said an easement in law amounts to a conveyance of an interest in land, which must be effected through a transfer as per the applicable law at the time.
50. The plaintiffs seem to argue that an easement was created by delay, default and or through implication of the Law of Limitations of Actions Act. The applicable law, in my view, would be the *Water Act*. As considered in *Kamau vs Kamau* (supra), an easement would be created through a deed or will. In the instant suit, there is evidence that the plaintiff's entry to the land in the first instance was permissive. How and when the animus possidendi to own as of right occurred is unclear.
51. The next issue is whether the defendant served sufficient notice to vacate the land to the plaintiffs. Sections 136 (2) and 138 (3) of the *Land Act* relate to the tenure of an easement. The defendant has not denied that the plaintiffs' entry on her land was within her knowledge and that of the successor in title since 2007. Before this, the predecessor in title had allowed the occupation with effect from in 1973. Therefore, prescriptive rights had accrued in favour of the plaintiffs after an effluxion of 20 years.
52. By the time the initial land was subdivided and a title deed was issued in favour of the defendant and her late husband, 20 years had elapsed. The defendant never sought to vary, rescind or terminate the easement. My finding is that the demand letter alleging trespass and or erection of illegal structures on the suit land was coming too late and or lacked basis since the plaintiffs had lawfully entered and erected water tanks on the land with the permission and or approval of the predecessor(s) in title. Due to the passage of time and lack of complaint from the defendant and the successors in title, the plaintiffs are justified to remain on the suit land.
53. Consequently, I find the prescriptive rights in favour of the plaintiffs had matured for this court to declare them absolute and indefeasible under Section 32 of the *Limitation of Actions Act*, which shall be registered against the title in their favour in trust for the Runogone Water Project.
54. There will be no order as to costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 17TH DAY OF JANUARY 2024

HON. CK NZILI

JUDGE

In presence of

Laikuru for Kayuyu for plaintiffs

Kiogora for defendant

