



Gichuhi & another v Land Registrar, Naivasha & 4 others (Environment & Land Case E024 of 2024) [2025] KEELC 246 (KLR) (Environment and Land) (30 January 2025) (Ruling)

Neutral citation: [2025] KEELC 246 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE E024 OF 2024
MC OUNDO, J
JANUARY 30, 2025**

BETWEEN

**FAITH MUTHONI GICHUHI 1ST APPLICANT
NANCY WAITHERERO GICHUHI 2ND APPLICANT**

AND

**LAND REGISTRAR, NAIVASHA 1ST RESPONDENT
THE ATTORNEY GENERAL 2ND RESPONDENT
ISMAEL KASSIM 3RD RESPONDENT
HADIJA KASSIM 4TH RESPONDENT
KENYA INFORMAL SETTLEMENT IMPROVEMENT PROJECT 5TH
RESPONDENT**

RULING

1. Vide an Originating Summons dated 10th June, 2024 the Applicants herein sought to be declared as owners of parcels of land known as UNS 11 COMM (Loc Market Gilgil, Nakuru) by way of adverse possession for which the court be pleased to issue an order compelling the Land Registrar Naivasha to issue them with title.
2. They also sought for and injunction restraining the 3rd and 4th Respondents or any other party acting on their behalf from howsoever offering for sale, interfering with the Applicants' ownership, occupation, use and interest over the suit land or otherwise from evicting or attempting to evict the Applicants and other residents from the suit land, reclaiming, and or harassing or interfering with their peaceful



entitlement, occupation and possession of parcel of land known as UNS 11 COMM (Loc Market Gilgil, Nakuru) to

3. In response, the 3rd and 4th Respondents vide their Notice of Preliminary Objection dated 23rd July, 2024 objected to being joined to the proceeding as they lacked the locus standi to be sued on behalf of the estate of the deceased Abdul Aziz Ibrahim since they were not the administrators of the said estate.
4. In addition to be a preliminary objection, in their Replying Affidavit sworn on the 14th August 2024, the 3rd and 4th Respondent deponed that the matter before court was res judicata pursuant to a ruling of 24th January 2023 of the Nakuru ELC in suit No 09 of 2022.(OS)
5. In response thereto, the Plaintiffs vide their Replying Affidavit dated 19th August, 2024 and sworn by Faith Muthoni Gichuhi, the 1st Plaintiff herein, deponed that the objection was misconceived, bad in law and aimed at unjustly denying them their rights to land parcel UNS 11 COMM (Loc Market Gilgil, Nakuru) (the suit property) because the suit property did not form part of the deceased's estate as the same had not been registered to anyone.
6. That whereas the suit property had originally belonged to the said deceased Abdul Aziz Ibrahim, he had left the same to the Plaintiff's mother before relocating to Tanzania and that they had continued to live therein peacefully and uninterrupted for the last 62 years even upon the demise of their mother and therefore had acquired adverse rights and/or interest over the suit property.
7. In their further Affidavit dated 20th September, the 1st Plaintiff had deponed that there had been new developments which had a direct bearing on the present matter to wit that the 5th Respondent had since published a list of beneficiaries under the Bondeni Informal Settlement Scheme Plan wherein the 3rd and 4th Defendants had been listed as beneficiaries of the suit property described in the list of beneficiaries as KSP/BD/P039.
8. That the said listing of the 3rd and 4th Defendants as beneficiaries of the suit property was a clear evidence that they were actively claiming an interest in the suit property contrary to the assertions in the preliminary objection that they were not the administrators or claimants to the suit property.
9. That subsequently, the Preliminary Objection that had been based on the premise that they were not administrators of the estate of Kassim Ibrahim with respect to the suit property was now baseless given the new evidence showing their beneficial interest in the suit property.
10. That accordingly, the Preliminary Objection should be dispensed with as it no longer held merit.
11. The 1st, 2nd and 5th Respondents were excused from participating in the present Preliminary Objection.
12. On 30th September, 2024, directions were taken that the Preliminary Objection be disposed of by way of written submissions, wherein the 3rd and 4th Respondent' submissions in support of the same was to the effect that their father Kassim Ibrahim the owner of the suit property died on 1st October, 2015.
13. That they were not administrators to the estate of their late father hence they lacked capacity to be sued on behalf of the estate. They placed reliance in the decided case of Pravinchandra Jamnadas Kakad v Estate of Lucas Oluoch Mumia & 2 others [2022] eKLR to submit that no suit could be instituted against them for a claim in relation to a deceased's property because they were not the administrators of the said estate. That in any event, the Applicants also lacked capacity to institute the suit on behalf of the estate of their late mother because they were not administrators of her estate.
14. That for a party to sue or be sued, he/she must have standing or locus standi, that is, the right to appear in court or file an action and that without such standing, even if a party had a meritorious case he/she could not be heard. Reliance was placed in a combination of decisions in the case of Law Society



of Kenya v Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000 and Alfred Njau and Others v City Council of Nairobi [1982] KAR 229. That it was trite that any action on behalf of a deceased person could only be brought to court or defended by the Personal Representative or Administrator of the deceased estate.

15. That pursuant to the provisions of Section 3(1), 51, 79 and 82 (a) of the *Law of Succession Act* as well as the decided case of Hawo Shanko *v Mobamed Uta Shanko (Civil Suit 1 of 2018)* [2018] KEHC 7084 (KLR) (11 April 2018) (Ruling) all the documents evidencing payment of the land rates bore the name of the late Ibrahim Kassim confirming that indeed the suit property still belonged to him and therefore they had been wrongly sued since they lacked capacity to be sued on behalf of the estate of the late Ibrahim Kassim. They prayed that their Preliminary Objection be allowed with costs.
16. In response and in opposition to the Preliminary Objection, the Applicants, vide their submissions dated 29th October, 2024 submitted that the present suit had been premised on the doctrine of adverse possession wherein the claim was based on the possession and use of a land for a continuous period of 12 years or more, without interruption and in a manner that was hostile to the interest of the true owner.
17. That the said doctrine operated independent of the issues of title and ownership of the estate of the deceased. That in the instant case, the claim had not been based on succession of the deceased's estate, but on the rights accrued by the Plaintiffs through adverse possession since the said Plaintiffs had been in continuous, open, and exclusive possession of the suit property for over 12 years, and the instant claim was being made on those facts. That subsequently, the issue of whether the 3rd and 4th Respondents were administrators of the Deceased's estate was irrelevant to the instant matter.
18. That in any case, the 3rd and 4th Respondent's objection was misplaced since the suit property was unregistered. That the objection to the effect that the 3rd and 4th Respondents could not be sued because they lacked locus standi as administrators applied where the property formed part of the deceased's registered estate. That however, in the present case, there had been no title to the suit property thus the 3rd and 4th Respondents' argument concerning the deceased's estate was irrelevant since legally, ownership or administration of the of the estate could not arise where there was no title or formal registration of the property. That accordingly, the issue herein was whether the 3rd and 4th Respondents were asserting right and interest over the suit property which affects the Applicants' rights.
19. That indeed, the 5th Respondent herein had in its list of beneficiaries to the Bondeni Informal Settlement Development Plan in Gilgil, Naivasha included the 3rd and 4th Respondents as beneficiaries and owners of the suit property which listing had been contrary to the 3rd and 4th Respondents' assertion that the suit property had formed part of their deceased grandfather's estate. That further, the said listing had demonstrated that the 3rd and 4th Respondents had asserted their interest in the suit property thus they were necessary parties in the present matter.
20. In conclusion, they submitted that the 3rd and 4th Respondents' Preliminary Objection lacked merit and should be dismissed with costs and allow the instant matter to proceed to hearing.

Determination.

21. I have considered the contents of the Preliminary Objection herein, the response in opposition and the submissions by Counsel for both parties as well as the authorities cited herein.
22. It is not in dispute that the Plaintiffs herein filed Originating Summons dated 10th June, 2024 against the 3rd and 4th Respondents seeking to be declared as owners of parcels of land known as UNS 11



- COMM (Loc Market Gilgil, Nakuru) by way of adverse possession wherein they had sought that the court be pleased to issue an order compelling the Land Registrar Naivasha to issue them with title.
23. In opposition, to the Originating Summons, the 3rd and 4th Respondents vide their Notice of Preliminary Objection dated the 23rd July 2024 and their Replying Affidavit sworn on the 14th August 2024, deponed that whereas they lacked the locus standi to be sued on behalf of the estate of the deceased Abdul Aziz Ibrahim since they were not the administrators of the said estate, the matter before court was res judicata pursuant to a ruling of 24th January 2023 of the Nakuru ELC in suit No 09 of 2022.(OS)
 24. In response, the Plaintiffs argued that since the 5th Respondent had published a list of beneficiaries under the Bondeni Informal Settlement Scheme Plan wherein the 3rd and 4th Defendants had been listed as beneficiaries of the suit property in the list of beneficiaries as KSP/BD/P039, it was a clear indication that they were actively claiming an interest in the suit property contrary to their assertions in the preliminary objection that they were not the administrators or claimants to the suit property.
 25. Consequently the issues that arises for determination is whether the preliminary objection is merited.
 26. The Plaintiffs herein seek to be registered as proprietors of parcels of land parcel known as UNS 11 COMM (Loc Market Gilgil, Nakuru) by way of adverse possession.
 27. The critical period for the determination as to whether possession is adverse is 12 years and the burden is on the person claiming to be entitled to the land by Adverse Possession to prove, not only the period but also that possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which were inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.
 28. Order 37 Rule 7(2) of the Civil Procedure Rules makes it mandatory that the extract of the register, or green card, be annexed to the Originating Summons and for a good reason because the same shows the history of the land in question as there could be entities against whom time cannot run for purposes of acquiring land by Adverse Possession which entries need to be excluded from the computation of time for example where land that is still registered under the Settlement Fund Trustee, it cannot be computed for purposes of an accumulating time for a claim of adverse possession.
 29. In the case of Johana Kipkurui Rotich vs. Charles Kiagi [2019] eKLR the court held as follows:

“It is clear from the above that one needs to annex the extract of the title. This provision of the law is not superfluous, for there are categories of land where time for Adverse Possession will not start running. Among these is land under the Government, which is covered under Section 41 of the *Limitation of Actions Act*.”
 30. Indeed the Court of Appeal in the case of Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996 held that:

“The combined effect of the relevant provisions of Sections 7, 13 and 17 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land (emphasis mine) in favour of an adverse possessor of the same at the expiry of 12 years of Adverse Possession of that land.”
 31. It is therefore clear from the foregoing provisions of the law and case law that a claim for Adverse Possession shall only be sustained against the proprietor of the suit land (see Court of Appeal's holding



in Peter Kamau Njau v Emmanuel Charo Tinga [2016] eKLR) and the predecessors and this can be so upon the claimant annexing the registerable document to the suit land.

32. The Plaintiffs herein have not annexed an extract of the title, or any other document of title, in relation to the suit parcel of land, to show who the past or the current registered proprietor is/are as required by the rules. As the matter stands, nobody knows who the registered owner of the land claimed by the Plaintiff is, and this court cannot tell whether the Plaintiff is disentitled to benefit from the running of time on the said title. I find in this case that the adversity of a title must be established as against a known owner and not in vacuum.
33. Secondly, although the 3rd and 4th Respondents in their Replying affidavit sworn on the 14th August 2024, at paragraph 3 contested that there had been a previous suit, being Nakuru ELC 09 of 2022, herein annexed as IK2 on the same subject matter, there had been no response from the Plaintiff.
34. In Nakuru ELC 09 of 2022 which was reported as Gichuhi *vs another v Kassim vs another (Environment vs Land Case 09 of 2022)* [2023] KEELC 158 (KLR) (24 January 2023) (Ruling) the parties therein had been Faith Muthoni Gichuhi and Nancy Waitherero Gichuhi (Plaintiffs) vs Ismail Kassim and Hadija Kassim (Defendants). The Defendants therein had raised a Preliminary Objection dated 20th June 2022 on the grounds that they had no capacity to be sued herein as the owner of the subject parcel of land known as UNS 11 COMM (Loc Market Gilgil, Nakuru) passed away on 1st October 2015 and they were not the administrators.
35. In his ruling of 24th January 2023, the Hon Judge had held as follows;
 11. In the instant case, it is not in dispute that the owner of the suit property died on October 1, 2015 and his heirs have been sued as the Defendants' in this case. It is also not in dispute that the Defendants' have not taken out letters of administration ad litem. The Defendants' therefore ought to have gained capacity to be sued first before the Plaintiffs' filed this case against them. It appears that the Plaintiffs' have shot themselves on the foot since they are the ones who have instituted the present suit against the Defendants who have no locus standi. They ought to have first issued a citation to the Defendants before instituting the instant suit but they did not. There is therefore no person properly joined as defendant in this suit. In order for one to be joined to a suit, he must be a proper party.
 12. In view of the foregoing, it is this court's view that the Defendants' lack the locus standi to be sued in this case. They indeed have no capacity to be sued in court on behalf of the said Estate of the deceased.
 13. I accordingly allow the Preliminary Objection and strike out the entire application dated May 12, 2022. In view of what has been stated above, the plaintiffs' suit cannot stand and therefore the originating summons dated May 12, 2022 is also struck out."
36. Indeed in the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that:

".....parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata....."



37. Now keeping in mind that the adversity of a title must be established as against a known owner and not in vacuum and also that the previous matter had been struck out for reason that the Defendants therein had no locus standi to be sued, and further keeping in mind that the Plaintiffs in the present matter have now added other parties wherein there are no of letters of Administration giving the 3rd and 4th Respondents the locus standi to be sued, and further being mindful of attributes of the decision in the Omondi Vs National Bank of Kenya Limited (supra), I find and hold that the Plaintiffs herein cannot thus prosecute a fresh suit in respect of the 3rd and 4th Respondents who still have no locus standi, and which issue had been determined in Gichuhi & another v Kassim & another (supra)
38. For the reasons herein above stated I find that the Plaintiffs' suit was a nonstarter and is accordingly struck out. The Preliminary Objection dated the 23rd July 2024 succeeds with costs to the 3rd and 4th Defendants.

DATED AND DELIVERED AT NAIVASHA VIA MICROSOFT TEAMS THIS 30TH DAY OF JANUARY 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

