



Kiberetu v Kibiti (Being sued as the administrator of the Estate of M’Irura M’Mungania alias Irura Mungania (Deceased)) (Enviromental and Land Originating Summons E009 of 2023) [2024] KEELC 1108 (KLR) (28 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1108 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2023

CK NZILI, J

FEBRUARY 28, 2024

IN THE MATTER OF SECTION 28H OF LAND REGISTRATION ACT CAP NO.3 OF 2012

AND

IN THE MATTER OF ORDER 37 RULE 1 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT

BETWEEN

SAMSON KIBERETU PLAINTIFF

AND

SILAS KIBITI DEFENDANT

BEING SUED AS THE ADMINISTRATOR OF THE ESTATE OF M’IRURA M’MUNGANIA ALIAS IRURA MUNGANIA (DECEASED)

JUDGMENT

1. The plaintiff moved this court through an original summons dated 13.5.2023. He seeks to be declared entitled to 2 acres out of L.R No. Nyaki/Munithu/327, registered in the name of the administrator of the estate of the late M’Irura M’Mungania alias Irura Mungania by virtue of adverse possession. The plaintiff relied on a supporting affidavit sworn on 12.5.2022, witness statements, and a list of documents dated 2.06.2023.
2. The defendant opposed the originating summons through a replying affidavit dated 20.7.2023, witness statements and a list of documents dated 5.10.2023. He termed the claim as false since he was the sole administrator and beneficiary of the suit land following transmission out of a probate cause. The defendant averred that the alleged occupation by the plaintiff has not been peaceful but violent and was



- an attempt to evict the actual beneficiaries of the estate from their ancestral land or frustrate them from occupying a land where their deceased matriarch was buried. The defendant averred that the plaintiff was seeking to benefit from the suit land without any justification.
3. At the hearing, the plaintiff adopted his supporting affidavits and witness statement as his evidence in chief. He termed the defendant as his cousin.
 4. Briefly, PW1 told the court that he has occupied, settled, developed and utilized approximately 2 acres of the suitland to the exclusion of the defendant. PW 1 told the court that after his late mother passed on, she was buried on the land without any interruptions from the defendant. He said he was born and brought up on the suit land and it was only after her late M'Ithara M'Mungania passed on that the defendant started evicting him from the land which is his only home. He said the defendant lives elsewhere and has never stepped into or utilized the land. The plaintiff produced a copy of the official search for L.R No. Nyaki/Munithu/327 as P. Exh No. (1), copy of the rectified grant as P. Exh No. (2), photographs showing his permanent developments and burial site on the land as P. Exh No. (3) (a), (b) & (c), respectively.
 5. In cross-examination, PW 1 said his mother, the late Sarah Kamenwa, was among the objectors in the succession cause for his late grandmother M'Irura M'Mungania but died during the pendency of the cause in 2004. Further, PW 1 said he testified in the probate cause, and the court ruled out his mother as a beneficiary to the estate. He said he also had applied for an injunction before the probate cause to forestall any eviction by the defendant from the land and an order was issued on 25.9.2013 for inhibition.
 6. PW 1 said nobody objected to the internment of the remains of his late mother on the suit land. He said the chief's letter dated 7.8.1999 was correct as regards a dispute before the chief officer by the parties. PW 1 said that despite the conclusion of the probate cause, no one had sought to evict him from the land, which he had extensively developed over the years.
 7. Thurania Rukunga, Evangelina Mataria and Julius Mburunga were called as PW 2, 3 & 4. All of them adopted as evidence in chief the witness statement dated 2.6.2023. PW 2 told the court the late M'Irura Mungania was a grandfather to the latter, being a son of Mukomurimi M'Ituaruchiu, a daughter of the late M'Irura M'Mungania. He confirmed that the plaintiff's mother used to live with him on the suit land until she passed on, and her remains were buried on the suit land.
 8. PW 3, on her part, confirmed that the deceased mother used to live, grow crops, and occupy the suit land as family land where they had constructed a permanent stone house. PW 4, on his part, said that as a chairman of Njuri Ncheke clan Nyaki East for over 20 years, he knew the plaintiff and his late mother and the land they have occupied and developed for over 12 years to the exclusion of the defendant.
 9. Silas Kibiti testified as DW 1 and adopted his replying affidavit and witness statement dated 20.7.2023 and 5.10.2023 as his evidence in chief. Briefly, he told the court he sought and obtained a grant, which was confirmed for the estate of the late M'Irura M'Mugambi, after which he acquired the land as a sole beneficiary. He said the claims by the plaintiff were unsustainable and would amount to denying or evicting the deceased's bonafide beneficiaries from their only land. He said the plaintiff appealed but failed to prosecute his appeal following the probate cause No. Meru H.C 167 of 1999, to which he had obtained inhibition orders.
 10. Besides DW 1 said he took over the administration of the estate from his late mother, Sarah Kamenwa Magana, the only child of the late M'Irura M'Mungania, a grandfather and the initial owner of L.R No. Nyaki/Munithu/327, which he had bequeathed to his only daughter.



11. Further, DW 1 said he used to travel from the Naari area to Munithu village with his late mother and siblings to till the land, a portion of which they had leased out to one Ciomwirichia M'Erimba. DW 1 said information reached his late mother; in 1990 that the lessees and his siblings had been attacked by a group of people claiming to be clan or family members alleging that the land belonged to them, who chased them out of the land while armed with crude weapons. He said the invaders destroyed all their crops and threatened to kill anyone who would step into the land.
12. DW 1 said the issue was reported to the area chief and clan elders, who in 1992 determined that the land belonged to his deceased grandfather, whose true successor was his late mother. He said efforts to remove the invaders through the area chief were in vain, following which his late mother filed a succession cause, which was finalized in 2019. DW 1 said he had been unable to evict the invaders, who were violent and adamant to the extent of obtaining eviction orders against him. Similarly, DW 1 produced a letter from the area chief, judgment in Meru H.C Succession Cause No. 167 of 1999, a rectified certificate of confirmation of grant, a certificate of an official search, orders extracted on 25.9.2023 and 3.4.2023 in the probate cause as D. Exh No's 1-6 respectively.
13. In cross-examination, DW 1 said that it was the plaintiff and one Karwirwa in occupation of his land after they violently chased them away in 1989, after which he made a report to the area chief, but the plaintiff refused to attend. He said the plaintiff was brought up in the Runogone area and only moved in during the invasion. DW1 said he merely obeyed the court order which was issued against the eviction by the probate court.
14. Haron Mbaabu Magana, Wilson Kagwiria, and Sarah Chelagat Kirimi were called as DW 2, 3 & 4, respectively. All of them adopted as evidence in chief their written statements dated 5.10.2023. They confirmed that the defendant and his late mother used to till the land before the skirmishes occurred in 1989.
15. With leave of court, parties filed written submissions dated 5.12.2023 and 27.12.2023, respectively. The plaintiff isolated three issues for the court's determination. Regarding the ingredients of adverse possession, which he believed he has demonstrated in his evidence, the plaintiff relied on *Maweu vs Lin Ranching & Farming Cooperative Society* (1985) KLR 430, *Samwel Miki Waweru vs Jane Njeri Richu C. A NO. 122 of 2001*, where the court cited with approval *Jandu vs Kirpal* (1975) E.A 225. The plaintiff submitted his evidence and documents clearly and demonstrated that he has been in open, exclusive, uninterrupted, and continuous occupation of the land for over 12 years, which time for adverse possession began to run from his childhood and after the death of his mother.
16. The plaintiff submitted that P. Exh No. 3 (a) (b) & (c) were a clear demonstration of his developments on the suit land that have been adverse to the rights of the valid owner. Relying on Section 17 of *Limitation of Actions Act* Cap 22 as read with Order 37 Rule 7 of the Civil Procedure Rules, the plaintiff submitted his claim against the defendant, as the registered owner of the suit land stands extinguished, and the defendant is estopped from denying that his late mother and himself have made extensive developments on the land following long and uninterrupted possession. Reliance was placed on *Githu vs Ndeete* (1984) KLR 776, as cited with approval in *Kabangi & 2 others vs Hannah Wairimu Gitau and another* (2019) eKLR.
17. Further to, the plaintiff submitted that it was not in dispute that the suit land initially belonged to the late M'Irura M'Mungania and was now being administered by the respondent. However, since adverse possession is attached to the land and not the title, the plaintiff submitted that it matters not that the land had changed ownership. Reliance was placed on *Maweu vs Lin Ranching* (supra), *Gacheru vs Miana Kabucha* (2016) eKLR, *Mbui vs Maranya* (1993) eKLR, *Wambugu vs Njuguna* (1983) KLR



- 173, *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015) eKLR and *Mbira vs Gachuhi* (2002) 1 EALR 137.
18. The plaintiff submitted that since the estate of the late M’Irura Mungania was yet to be distributed, and therefore, his share of the estate through his late mother, Mukorimi M’Tuaruchiu, upon her demise, remained intact. Similarly, the plaintiff submitted that the entry into the land arose out of being born, growing up, and living with his late mother on the suit land; hence, it was not a permissive entry. Reliance was placed on *Mombasa Teachers Cooperative Savings & Credit Society Ltd vs Robert Muhambi Katana & others* (2018) eKLR.
 19. On the nature of the occupation, the plaintiff submitted that his photographic evidence was clear that he had made extensive and permanent developments on the land openly without secrecy, exclusively, and with the sole intention of owning the land.
 20. The plaintiff submitted that the probate cause filed by the defendant was not an eviction case, and the mere assertion of inheritance rights did not interrupt his claim based on adversity. Reliance was placed on *Isaac Cypriano Shongore vs Kipketer Togom* (2016) eKLR, *Benson Mukuwa Wachira vs Assumption sisters of Nairobi Registered Trustees* (2016) eKLR as affirmed in *Amos Weru Murigu vs Marata Wangari Kambi & another* HCCC No. 33 of 2002 (OS) Kakamega.
 21. The plaintiff submitted that he has identified 2 acres out of the suit land as what he has asserted adverse possession of in line with Order 37 Rule 7 Civil Procedure Rules by attaching a copy of the title. Reliance was placed on *Wilson Kazungu Katana & others vs Salim Abdalla Bakshwein & another* (2015) eKLR.
 22. On his part the defendant isolated five issues for the court’s determination on the registration status of the land. The defendant submitted his pleadings, and evidence was clear that he was a grandson of M’Irura M’Mungania, who died in 1963 and was survived by the only heiress, Sarah Kamenwa Magana. The defendant submitted entry to the land by the plaintiff’s relatives was forceful and violent, going by the evidence of Ciomwirichia M’Trimba in paragraphs 8 & 30 on pages 19, 22 & 25, of the defendant’s paginated bundle.
 23. The defendant submitted that all the plaintiff’s deceased mother’s objections at the probate cause were unsuccessful and that it was only after the court’s decree that the plaintiff rushed to court to file this suit on 12.5.2023. Relying on *Njeri Kimani Njoroge (deceased) vs Edwin Onesmus Wanjau* (suing in her capacity as the administrator of *Kimingi Wariera (deceased)* and of *Mwangi Kimingi (deceased)*) (2022) eKLR, *Isaac Cypriano Shingore vs. Kipketer Togom* (supra), the defendant submitted that he had demonstrated various steps taken to assert title or evict the plaintiff, but which were frustrated due to the violence, lack of capacity and the injunctive orders issued in the probate cause, termed developments, if any on the suit land by the plaintiff, as forcefully undertaken during the pendency of the succession cause.
 24. On the law relating to adverse possession, the defendant relied on the ingredients set out in *Raphael Kagali Muhindi vs. Mary Jerotich Misoi* (2021) eKLR, *Wambugu vs Njuguna* (supra), *Ahmed Abdulkarim & another vs Members of Land & Mines and another* (1998) E.A Benjamin Kamau Murima & others vs *Gladys Njeri* C.A No. 213 of 1996, *Kasuve vs Mwaani Investments Ltd & others* (2004) 1 KLR 184, *Mtana Lewa vs Kahindi Ngala Mwangandi* (supra), *Harrison Oyari & 588 others vs Mareo Oriambu & others* (2016) eKLR, *Mbui vs Maranya* (supra), *Samuel Kihamba vs Mary Mbaisi* (2015) eKLR.
 25. In summary, in the cited case law, the defendant submitted that the plaintiff’s entry to the land was through force, threats, menace, or violence, and in taking advantage of that, the heiress and the



- defendant lived far away from the suit land. Nevertheless, the defendant submitted that he has asserted his right over the land and consistently resisted the entry and occupation by reporting the same to the area chief and obtaining a confirmed grant to regain control of the suit land.
26. On the burden of proof, the defense submitted that if there was any evidence of the plaintiff's stay on the land, unfortunately, the same was forceful and through the aid of court orders. Reliance was placed on *Mbui vs Maranya* (supra) and *Kweyu vs Omuto C.A No 8 of 1990*.
 27. On the alleged family relations, the defense submitted that the suit land belonged to the late M'Irura M'Mungania, whose widow was Cionkonge, who had two daughters, the mother to the plaintiff and the defendant but who have different fathers. The defendant submitted the probate cause pitted two sisters, each claiming superior or equal rights to inherit the land; which dispute in this suit now involves their children, who are cousins.
 28. The defendant submitted that in the probate case, it was held that he could not evict the plaintiff until the court pronounced itself on the two rival rights. The defendant submitted that adverse possession was inapplicable in the circumstances of this suit; otherwise, the court would be aiding wrongdoers clinging to the family land for over 30 years despite losing in the earlier suit.
 29. The single issue for my determination is whether the plaintiff qualifies to be declared entitled to 2 acres of land out of L.R No. Nyaki/Munithu/327, by virtue of adverse possession.
 30. Adverse possession occurs when an intruder takes possession of land, disposes, or drives out the actual owner from it for a period of 12 years with the knowledge of the owner in an open, exclusive, uninterrupted and with the intention of owning the land. See *Ruchine vs Swift Rutherford (1980) KLR*, *Wambugu vs Njuguna* (supra), *Kasuve vs Mwaani* (supra) and *Mtana Lewa* (supra), adverse possession must be identifiable and specific. There must be elements of dispossession or acts by the applicant that are inconsistent with the enjoyment of the soil by the true owner. See *Githu vs Ndeete* (supra). The occupation must be uninterrupted by the true owner through the assertion of his right and or the admission of the right of the true owner by the adverse possessor, retaking of possession, or through an eviction process. See *Joseph Gachumi Kiritu vs Lawrence Munyambu Kabure (1996) eKLR*.
 31. In *Samuel Kihamba vs Mary Mbaisi* (supra), the court said adverse possession was a matter of evidence whose standard of proof is on a balance of probabilities, which evidence, as held in *Wambugu vs. Njuguna* (supra), is based on two key aspects;- the dispossession of the true owner from the land and the discontinuance of possession of the true owner by the adverse possessor for a period of 12 years. The court cited *Eunice Karimi Kibunja vs Mwirigi M'Ringera Kibunja (2013)* on adverse possession among relatives over ancestral land. The court cited *Eliva Nyongesa Lusenaka & another vs Nathan Wekesa Omacha Kisumu C. A No. 134 of 1993*, that the ingredients of adverse possession must be followed irrespective of whether the parties were or are related or disputing on ancestral land. The court said open and willful dispossession means that the owner knew, actual or otherwise, or had the means of knowing that the claimant had occupied his land.
 32. The court further cited with approval *Mwinyi Hamisi vs. A.G. & another C.A No. 125 of 1997* that adverse possession does not apply where possession is by consent or license from the true owner. Additionally, the court cited with approval *Eunice Karimi Kibunja vs Mwirigi M'Ringera* (supra) that occupation by relatives on ancestral land did not fit the quality of a licensee since the claimant had occupied the land as a child and later on had helped the respondent in acquiring the land registration under his name.



33. Moreover, the court cited *John Baraza Ojiambo vs Veronica Auma Ojiambo & others* (2013) eKLR and expressed its reservations on whether one could evict his father, stepmother, or stepbrothers to prevent time from running against him under Cap 22. The court cited *Rodgers Mwamboje vs Douglas Mwamboje* (2014) eKLR that under African customs, the issue of consent for one staying in a brother's land for more than 12 years was a rebuttable presumption on the claimant and guided by the holding in *Mbui vs. Maranya* (supra), that under the African cultural set up allowing relatives to stay on one's land was normal. The court in *Samuel Kihamba vs Mary Mbaisi* (supra) said it had to determine whether any consent had been given by the owner of the land to a relative, if and when it was actually withdrawn. Further, the court said, guided by *Peter Mbiri Michuki vs Michuki* (2014) eKLR, that possession of land could be actual, physical, or constructive in nature, either individually through a licensee or relative who was occupying the land on behalf of the claimant.
34. In *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi* (2020) eKLR, the court said adverse possession was hostile possession by clearly asserting hostility and the denial of the title of the true owner, which starts with wrongful possession. The court said an entry on the land with permission or by a gift from a late father who had no proprietary right to do so was not enough. The court said the non-use of property by the owner for an extended period did not itself amount to adverse possession unless the claimant had taken possession and asserted rights over it.
35. The court said a claimant must prove the date of entry, nature of possession, length of possession, and if it was open and undisturbed for a period of 12 years. The court held that the meeting by the clan leaders to resolve the dispute between the parties in 1992 had challenged the appellant's peaceful and uninterrupted possession since 1970 and was further evidence that the respondent had not acquiesced to the appellant's possession of the land.
36. Guided by the preceding case law, the plaintiff in this suit has pleaded that he has all his life occupied, settled on, developed, and utilized a portion of the suit land measuring approximately 2 acres out of the total land. A copy of the search produced shows that L.R No. Nyaki/Munithu/327 is 1.8 ha, P. Exh No. 2 shows that the land was distributed to Silas Nkubitu, David Mutwiri Magana, and Harun Magana in shares of 2 acres, 1 ½ acres each, pursuant to a rectified grant dated 11.10.2012. No copy of the records was produced to show that the land initially belonged to the late M' Irura M' Mungania alias Irura Mungania to support the averments in paragraph 3 of the affidavit to the originating summons.
37. The plaintiff, in his witness statement filed on 6.6.2023, averred that he was living with his late mother at his late grandfather's land, M' Irura M' Mungania and that it was only after her demise that the defendant started purporting to evict him. The defendant has, however, admitted that the plaintiff is his cousin. In Meru H.C. Succession Cause No. 167 of 1999, it was indicated that the deceased passed on on 27.12.1963 and was succeeded by the mother to the defendant's mother.
38. The plaintiff's mother had filed an objection, claiming to be the eldest daughter of the deceased. The defendant's mother passed on before the grant was issued, leading to the defendant substituting the deceased. A rectified grant was thereafter issued on 11.12.2012. The plaintiff herein, as the 1st interested party, unsuccessfully applied for the revocation of the grant, claiming the land to be ancestral in nature or occupied by the interested parties. The plaintiff testified in the probate court as PW 1, saying the objector Mukomurimi M' Tuaruchiu was his late mother who, after divorcing his father, went to live on the suit land and that his grandfather had allegedly shared the land among his two daughters and some cousins. He testified that the objections by his late mother had not been determined by the time she passed on. The probate court held that the plaintiff herein seemed unaware of his family ancestry. The court made a finding that the plaintiff's deceased mother was not a daughter of the late M' Irura M' Mungania, though her late mother, Cionkonge, was a wife of the deceased. The reason was



- that evidence came out clearly that when Cionkonge was married by her late husband, the plaintiff's deceased mother did not accompany her to the new home or was not taken in by the new husband as his adopted child.
39. The second issue that the probate court determined was whether customary trust was applicable to the alleged occupation by the interested parties. The court made a finding that the 2nd and 3rd interested parties had sold their late father's share, following which they allegedly trespassed into the defendant's land. The court dismissed the claim by the 2nd and 3rd interested parties based on customary trust. The probate court found no basis to revoke or annul the confirmed grant, since the plaintiff's late mother's claim as a dependant to the estate was unsubstantiated or remote.
 40. What is clear from the probate cause is that the defendant's late mother sought and obtained letters of administration on 17.12.1999 and applied for confirmation on 28.2.2001, which was allowed on 13.2.2009. It was only after the rectification of the grant in favor of the defendant on 11.12.2012 that the plaintiff sought its revocation on 16.9.2013.
 41. In this suit, the plaintiff did not plead his date of birth, when his late mother divorced his late father and went back to the suit land and his relationship to the land, so as to advance an independent claim on it, given the probate court found that his late mother was not a beneficiary of the estate of the initial land owner.
 42. The date when time for adversity started running was not pleaded. No ID card or birth certificate was availed to show when the plaintiff was born or when his late mother passed on. The plaintiff produced no evidence to show that prior to 1999, his late mother or himself were occupants of the suit land and had asserted ownership and or lodged a probate cause since 1964. The plaintiff's mother did not assert and or obtain superior rights of inheritance against the defendant's late mother during her lifetime. Attempts to do so in the probate cause were not followed up until she passed on. The plaintiff waited for too long to advance the objection. He purported to do so without letters of administration to represent the estate of his deceased mother.
 43. The rectified grant was issued on 11.12.2012, while the revocation application was filed on 16.9.2013. If then the plaintiff asserts that his occupation of the land was by virtue of his birth and or relationship with his late mother, as held in *Richard Wefwafa Songoi vs Ben Munyifwa Songoi and Samuel Kihumba vs Mary Mbaisi*, a party who could not gift or be gifted the land such as his late mother had nothing to pass to the plaintiff. The plaintiff has not pleaded and or advanced any claim based on customary trust. There was no evidence tendered that his late mother had sought to formalize her occupation on the suit land with her late step-sister, the mother to the defendant, or by extension her late father, M'Irura M'Mungania if at all it was him who had authorized her to occupy the land as a stepdaughter.
 44. The pleadings filed by the plaintiff's deceased mother in the objection to the grant by the defendant's late mother before she died have not been produced, at the very least, to clarify when she got divorced and or on what basis she was living on the suit land with the plaintiff. In adverse possession, it is not enough to allege occupation for over 12 years without the intention to dispossess and discontinue possession of the true owner.
 45. The defendant's late mother was consistent before she passed on as early as 1999 that the land belonged to her. That assertion was eventually confirmed by way of a grant on 13.2.2009. See *Githu vs Ndeete* (supra). After that, the defendant took over on 11.12.2012. The period between 2009 and 2013, when the plaintiff started asserting ancestral interests, was not accounted for. After losing in the probate cause on 4.12.2019, it took the plaintiff another close to 3 ½ years to move to this court for adverse possession.



46. The defendant has also pleaded that the entry was forceful and violent and has been resisted throughout by way of reports to the area chief, the elders, the police, and the court. Adverse possession must be devoid of violence or stealth. In the case of *Chevron (K) Ltd vs Harrison Charo Wa Shutu* (2016) eKLR, the court said that there must be a clear mind and intention of dealing with the land exclusively and in a manner in conflict with the true owner's right. The court said there must be no force nor secrecy and without permission of the owner. In *Kweyu vs Omuto* (1990) KLR 709, the court said possession must be proved through facts and cannot be assumed as a matter of law from mere exclusive possession, however long it continued. The court said adverse possession must rest on de facto use and occupation.
47. In *Mbui vs Maranya* (supra), the court said exclusive possession means the exercise of dominion over the land must not be shared with the disseized owner. There is evidence that the defendant has continued utilizing part of the land through leasing to a third party. It cannot, therefore, be true that the defendant was discontinued possession of his land to the exclusive use by the plaintiff. In *Mbui vs Maranya* (supra), the court said an adverse possessor must make out a case of an unequivocal exclusive possession, sufficient to deprive the owner of the soil.
48. Looking at the totality of the plaintiff's evidence, he has failed to prove all the ingredients of adverse possession to the required standard. The suit is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 28th DAY OF FEBRUARY 2024

In presence of

C.A Kananu

Miss Ochola for the plaintiff

HON. CK NZILI

JUDGE

