



**M'Nyiruu v Nkabo (Enviromental and Land Originating Summons
53 of 2019) [2024] KEELC 1720 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1720 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 53 OF 2019**

CK NZILI, J

MARCH 20, 2024

BETWEEN

JULIA WANJA M'NYIRUU PLAINTIFF

AND

DINAH KAWIRA NKABO DEFENDANT

JUDGMENT

1. By an originating summons dated 26.9.2019, the plaintiff seeks to be declared entitled to LR No. Abothuguchi/Katheri/969, through adverse possession.
2. The defendant opposed the originating summons by a replying affidavit sworn by Dinah Kawira Nkabu on 28.10.2024. It was averred that the suit is mischievous, lacks merit, is an abuse of court process and res judicata due to Meru HC Succession Cause No. 15 of 2013. The defendant averred that the plaintiff is her aunt, a sister to her uncle, Samson Mutua, who was a party to the probate cause. She termed her as an intermeddler to the estate, acting in cohorts with her uncle to defeat the ruling in the probate cause through the back door.
3. The defendant averred that this uncle had been charged with fraud in Meru Chief Magistrates Court case No. 527 of 2019, for illegally selling one of her father's plots to a third party, only for him to be released on humanitarian grounds after suffering from a stroke. Further, the defendant averred that the plaintiff had tried to defraud her by using a chief from another location to apply for letters of administration. The defendant averred that the plaintiff was not as destitute as she had alleged, for she inherited 1 acre of land from her late father. The defendant averred that they had suffered a lot for the last six years trying to pursue her late father's estate from the plaintiff and her uncle, who has been enjoying possession of the land on top of Kshs.12,000,000/= they had acquired after disposing of part of the estate.



4. Following interlocutory applications dated 26.9.2019 and 30.10.2019, the court directed the executive officer of the court to conduct a scene visit. It took place on 11.12.2019, to establish who was in occupation of the land and the developments thereon. A report dated 11.12.2019 confirmed that the plaintiff was in occupation of the suit land and had a semi-permanent timber house connected with water and electricity. Further, it was established that there was one big stone house and a cow shed that had been constructed on the land by the plaintiff's late father.
5. At the trial, Julia Wanja M'Inyiruu testified as PW 1 and adopted her witness statement dated 1.2.2021 and a supporting affidavit sworn on 26.10.2019 as her evidence in chief. Briefly, she told the court that LR No. Abothuguchi/Katheri/969 was family or ancestral land initially owned by her late father, who transferred it to Samuel Kiruki M'Inyuri, who used to live elsewhere. PW 1 said that when the land was registered under his name, she was still on the land since women could not be registered as owners of the land. She said she has lived on the land all her life now, aged 70 years for she was never married and has erected permanent structures on the land.
6. PW 1 denied that the defendant was a daughter of her deceased brother, for he died childless, and that the defendant has never lived on the suit land. PW 1 produced a copy of the green card as P. Exh No. (1), photographs showing her development on the land as P. Exh No. (2) and the scene visit report as P. Exh No. (3).
7. In cross-examination, PW 1 told the court her late brother never introduced the defendant as his daughter and was in dire need of the land since she had nowhere else to call home. PW 1 denied that she was merely entitled to a lifetime interest in the land as alleged by the defendant. Her testimony was that she had been on the land as a matter of right with the full knowledge of the predecessor in title, who had no objection to the many permanent developments she had undertaken on the land. PW 1 denied that her late father, M'Inyiru, had given her an alternative parcel of land as part of the ancestral land. In re-examination, PW 1 told the court she has all along been living on the suit land while undertaking farming activities. She said the defendant had sold a lot of the land only leaving her with a small portion of it.
8. Samson Mutua M'Nyiru testified as PW 2 and adopted his witness statement dated 17.10.2023 as his evidence in chief. He told the court that his late father called for a family meeting in 1975 with the intention of transferring the suit land to the late Samuel Kiruki M' Inyiru as the elder son, who was also educated PW 2 said the plaintiff was still living on the suit land since she was unmarried. He said his brother never lived on the suit land until he passed on in 2009. PW 2 said that his sister has exclusively and extensively developed the suit land as per photographs produced and has never been stopped or evicted from the suit land.
9. In cross-examination, PW 2 denied frustrating or attempting to defraud the defendant of any land. He said his late brother left behind no wife or children, hence the reason that he had filed a probate cause. PW 2 said that since the family had no money when his brother passed on in a road traffic accident, he was forced to mobilize resources to offset the enormous hospital and funeral bill. PW 2 said it took him over three years to clear the bill. He denied that he was facing any criminal charges related to the estate of the deceased.
10. Dinah Kawira Nkabu testified as DW 1 and relied on her replying affidavits dated 28.10.2019, 19.11.2019, and 21.8.2020 as her evidence in chief. Briefly, she said the land belonged to her late father which she has been tilling. She said that after the probate cause, the land was subdivided; hence, LR No. 969 was non-existent, documents as per a list she produced namely Succession Cause No. 15 of 2013 as D. exh No. (1) petition for letters of administration as D. exh No. (2) affidavit in support as D. Exh No. (3), consent as D. Exh No. (4) certificate of thumbprint as D. Exh No. (5) summons for



confirmation of grant as D. Exh No. (6), affidavit as D. Exh no. (7), consent as D. Exh No. (8) & (9), judgment as D. Exh No. (10), decree as D. Exh No. (11), amended certificate of grant as D. Exh No. (12), official search for LR No. Abothuguchi/Katheri/1129 as D. Exh No. (13), charge sheet in Meru CM Cr. Case No. 527 of [2019] as D. Exh No. (14).

11. In cross-examination, DW 1 told the court she was a resident of Katheri Area Meru, though her address in the replying affidavit was Chogoria area. DW 1 said that she grew up with her mother in Nakuru but used to live with her grandfather at Chogoria, where she grew up. She said her mother and the late Samuel Kiruki separated when she was one year old as they were mere friends, however, she said the late Samuel Kiruki took up the responsibility of educating her.
12. DW 1 said she subdivided the land into two portions out of an order issued on 30.9.2019 following the completion of the probate cause but before this suit was filed. DW 1 said her land was invaded by PW 2 in an attempt to disinherit her of the land. She, however, admitted that the plaintiff, who is sickly, has been living on the land since her childhood together with her late father, though her portions of land were elsewhere. DW 1 said the plaintiff was among the listed beneficiaries in the succession cause but forfeited her share.
13. Patrick Mwenda Gichuru and Geoffrey Marangu M'Inyuruu testified as DW 2 and DW 3 and confirmed that the plaintiff has been living on the suit land for many years following her divorce from her former husband. They, however, said the developments on the suit land were put up by the late Samuel Kiruki and not the plaintiff, who had authorized her to occupy his land. DW 3 said that the defendant was a daughter of his late brother Samuel Kiruki, who has been living elsewhere at her mother's home, though she would occasionally visit the suit land. Similarly, DW 3 said that the plaintiff was allowed to occupy the land by his late brother, though she had inherited a separate parcel of land from their late father. He termed her a temporary licensee after divorcing one Magiri Kagara, her estranged husband.
14. Following the closure of defense testimony, parties were directed to file and exchange written submissions. The plaintiff relied on written submissions dated 21.12.2023. It was submitted that adverse possession was a method of gaining legal title to land by actual open, hostile and continuous possession of it to the exclusion of the true owner for a period of 12 years. Relying on Sections 7, 13, 17, 38(1) & (12) of the *imitation of Actions Act* (Cap 22), Section 28 (h) of the *Land Registration Act* and Section 7 of the *Land Act*, the plaintiff submitted that for one to succeed in adverse possession, a party must prove two elements possession and discontinuance of possession as held in *Wambugu v Njuguna* [1983] KLR 173, *Mbira v Gachubi* [2002] 1 EALR 137, *Jandu v Kirpal & another* [1975] E.A 225 and *Mtana Lewa v Kabindi Ngala Mwangandi* [2005] eKLR.
15. The plaintiff submitted that from the evidence tendered she has proved the two elements due to her uninterrupted and exclusive possession of the land since 1973 that was never interrupted by the probate cause.
16. Relying on *Kenya Power and Lighting Company v Pamela Awino Ogungo* (2015) eKLR, the plaintiff submitted that the burden under Sections 107 – 109 of the *Evidence Act* had been discharged through her undisputed evidence of possession and developments by the defendant, who has not linked herself to the land, its occupation and development. The plaintiff submitted the attempt to admit occupation as a life interest by the defendant clearly shows she has a legitimate and valid claim on the land. The plaintiff submitted that the alleged subdivision of the initial land was illegal, given the orders issued on 16.10.2019 to maintain the status quo.
17. Adverse possession occurs when an intruder enters into a land and asserts rights adverse to those of the true owner in an open, exclusive, uninterrupted, and notorious manner for a period of 12 years.



See *Ng'ati Cooperative Limited Farmers v Codicillary Ledidi & others*. In order to establish adverse possession, a claimant must prove two ingredients namely possession and discontinuance of possession of the true owner. See *Wambugu v Njuguna* (supra) *Mtana Lewa v Kabindi Ngala* (supra) and *Jandu v Kirpal* (supra).

18. Regarding adverse possession between relatives, in *Leonard Otworu Juma v Francis Ongaki Mamboleo* [2022] eKLR, the court cited *Waweru v Richu C.* A No. 122 of 2001 that adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the true owner. Further, in *Wanje v Saikwa* [1984] eKLR, the court said a person who occupies another person's land with that other person's consent, could not be said to be in adverse possession as, in reality, he has not disposed of the owner of his land and the possession is not illegal and that there was no adverse possession until the license has been determined.
19. As to the activities forming part of adverse possession, the court said cultivating and residence were among them. See *Benjamin Kamau Murima & others v Gladys Njeri* NRB C.A No. 213 of 1996. The court said dispossession, therefore, means that the adverse possessor comes in and drives out the person in possession from possessing the land, while discontinuance is where the person in possession goes out and is followed into possession by the intruder. In law, a person does not necessarily discontinue possession of land simply because he does not use his land.
20. The possession must be inconsistent with the actual owner's title in *Seven-Day Adventist Church E. A Ltd v Isoge F.C.S Nyamira* ELC No. 42 of 2021 the court said adverse possession was not meant to be an instrument of fraud and ingratitude. In *Mbui v Maranya* [1993] eKLR, the court cited *Kweyu v Omuto* C. A No. 8 of 1990, that in excising adverse possession, the court draws legal inferences from proven facts. The court said possession was a matter of fact and the adverse character of the possession must be proved through facts and cannot be assumed, including the clear intention to hold adversely and under a claim of right, defacto use, and defacto occupation being shown. See *Kasuve v Mwaani* [2004] KLR 184 and *Samuel Kihamba v Mary Mbaisi* [2015] eKLR.
21. In *Njenga Kimani & 2 others v Kimani Nganga Wainaina* [2017] eKLR, the court was faced with a claim of adverse possession among close relatives. The court said it was common for relatives to allow each other possession, and one would not expect them to be kicked out before the expiry of 12 years so as to defeat any claim of adverse possession. See *Bernard Ndungu v David Komu Mukumbu* [2021]eKLR.
22. Applying the case law above, the plaintiff has pleaded and testified that the land initially belonged to her late father who transferred it to his elder son while she was in occupation since women could not be registered as land owners in 1975. Neither the defendant nor her defense witnesses disputed the occupation of the plaintiff on the suit land. The only issue raised by DW 2 and 3, who are the brothers of the plaintiff, is that it was a permissive entry as a licensee after the plaintiff divorced her former husband.
23. The late Samuel Kiruki passed on on 25.9.2009. Even if he is the one who had permitted the plaintiff to occupy her land, which he had acquired in 1975 from his late father, going by the copy of records, there was no evidence tendered by the defendant to show that the deceased had given notice to the plaintiff to vacate his land before he passed on. Suppose there existed any license between the plaintiff and her deceased brother, the same as per law terminated upon the death of the deceased on 25.9.2009. So, time for adversity, which was still running with effect from 1975, continued to run against the land. As at the time the defendant acquired a title under her name, the right of the plaintiff to the land on account of adversity had matured.



24. Interruptions of time from running occur if the true owner asserts the rights, applies for vacant possession or eviction orders and the intruder acknowledges the title. In this suit, the plaintiff has said that she was occupying the land as a matter of right, which is why she undertook extensive permanent developments on the suit land, which the predecessor and successor in the title did not interrupt, stop, or order her to vacate the land. While acknowledging the occupation of the land by the plaintiff, the defendant takes the view that she only enjoys a life interest on the land and that her alleged rights to the suit land were determined in the probate cause.
25. Beneficial or third-party rights to an estate of a deceased person fall under the determination of the Environment and Land Court. See the [Re-estate of Alice Mumbua Mutua \(deceased\)](#) 2017 eKLR. The plaintiff's claim is, therefore, properly before this court. It is not *res-judicata*. The issues raised herein were not determined to finality in the probate cause. As to life interest, the same applies to a spouse of a deceased.
26. On life interest, the plaintiff is a sister to the deceased but not a spouse. She is, therefore, not covered by Sections 35 & 83 (e), (f) & (g) of the [Law of Succession Act](#). See [Tau Katungi v Margaethe Kakungi & another](#) [2014] eKLR.
27. The plaintiff has defined the area of the land subject to adverse possession. She produced a copy of the records for the land she seeks to be declared entitled to. The defendant has alleged subdivision of the suit land following a court order. An order of status quo was issued by this court on 16.10.2019; if the defendant purported to subdivide the land into two, it was against the court order.
28. Adverse possession runs against the land. In this instance, the plaintiff's claim is not defeated by the change of status of the title. If, therefore, the defendant subdivided the land parcel LR No. 969, the said subdivisions are subject to the accrued rights of the plaintiff, which is now declared against the suit land and any resultant subdivisions. The defendant is directed to sign the transfer forms in favor of the plaintiff within two months from the date hereof in default the Deputy Registrar of this court shall execute the same.
29. Costs to the plaintiff.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 20th DAY OF MARCH, 2024**

In presence of

C.A Kananu

Onyango for Kaunyangi for the plaintiff

Dinah defendant in person

HON. C K NZILI

JUDGE

