



Kioga v M'birithia (Sued as the Administrator of the Estate of Mburugu M'Nkanata alias Mburugu Kioga alias Kioga Mburugu Nkanata alias M.M Kioga alias Mburugu Kioga - Deceased) (Environment & Land Case E001 of 2023) [2024] KEELC 4099 (KLR) (15 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4099 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E001 OF 2023**

CK NZILI, J

MAY 15, 2024

BETWEEN

EVERLYNE KIOGA PLAINTIFF

AND

MARY COMAROO M'BIRITHIA (SUED AS THE ADMINISTRATOR OF THE ESTATE OF MBURUGU M'NKANATA ALIAS MBURUGU KIOGA ALIAS KIOGA MBURUGU NKANATA ALIAS M.M KIOGA ALIAS MBURUGU KIOGA - DECEASED) DEFENDANT

JUDGMENT

1. The plaintiff filed an originating summons dated 7.11.2023 seeking to be declared the owner of L.R No. Nyaki/Mulathankari/355 by virtue of adverse possession. At the hearing, the plaintiff PW 1 told the court that the late Mburugu M'Nkanata alias Mburugu Kioga alias Kioga Mburugu Nkanata alias M.M Kioga alias Mburugu Kioga was her brother with whom she lived with since her teenage years. She said that her late brother bought L.R No. Nyaki/Mulathankari/355, (hereinafter the suit land) in 1986 and relocated to the land alongside her young family from the initial residence in L.R No. Nyaki/Munithu/388. Since 2000, the plaintiff told the court that she has exclusively occupied the land by undertaking extensive developments therein, among them subsistence farming and the erection of a homestead by her sons.
2. PW 1 told the court that when his brother passed on in 2016, he left her occupying the land, and neither he nor his family had occupied or used the land. She told the court that the land was registered in the name of the defendant as the legal administrator of his late brother's estate in accordance with a succession cause.
3. The plaintiff produced a copy of a limited grant of letters of administration dated 22.10.2019, a copy of an official search, a copy of a green card, and photographs as P. Exh No. 1, 2, 3, 4 (a) – (f), respectively.



4. In cross-examination PW 1 told the court that his late brother never demanded the land from her during his lifetime, since taking possession of it in June 2000, so as to take care of her young family. PW 1 said the ancestral land was different from the suit land, which, unfortunately, she was denied a share of by her brothers-in-law. She denied that her occupation of the land was subject to her children attaining the age of majority. PW 1 said she has been on the land as a matter of right and with a view of owning it.
5. Regarding the will made by the late Kioga, PW 1 disputed its contents, for he allegedly made it while sick or under duress and was all aware of her occupation of the suit land. PW 1 confirmed that she had not objected to the succession cause, for she was not privy to or made aware of the same. She denied that her occupation of the land terminated with the death of the deceased. Her view was that P. Exh No. 4 (a) – (f) was clear that here was a get together on the suit land where her home is situated. PW 1 denied undertaking to vacate the land after the deceased passed on. In re-examination, PW 1 told the court the deceased never ordered her to vacate the land during his lifetime or cease any developments thereof. She denied any existence of an agreement to hand over vacant possession after the deceased passed on.
6. Stephen Gitonga testified as PW 2 as a son of PW 1. He associated himself with the evidence of PW 1 that they have been on the land since 2000, where they have constructed permanent buildings. He said that he moved into the land at the age of 22 because his late uncle was a generous man. PW 2 said his late grandfather M'Nkanata had distributed his family land in Uruku and Uringu land. He denied that the area chief had given her mother a letter to lodge a succession cause for the estate of his late grandfather. PW 2 said that while he was born and brought up in Munithu land, they moved to the suit land in 2000 where he got married and settled his family.
7. Julius Mungania M'Mutungu was called as PW 3. As a neighbor of PW 1, he told the court that whereas the land belonged to the late M.M Kioga, it was the plaintiff and her family who had been occupying and developing the land. Stanley Kinoti M'Imugava testified PW 4. He associated himself with the evidence of PW 3, a co-neighbor to the plaintiff. He said he had known the late M.M Kioga since 1979/80, who had permitted PW 1 to utilize the land, which, in his estimation, had been for close to twenty years. Another neighbor also corroborated his evidence, Geoffrey Kirimi Mbiriti, who testified as PW 5, marking the close of the plaintiff's case.
8. The defendant, on the other hand, denied the plaintiff's claim through a replying affidavit sworn by Mary Comaroo M'Birithia. It was averred that the late Mburugu Kioga bought the land and became the registered owner on 7.7.1986, following which he allowed his younger sister with a young family to utilize a portion of the land to cater for the family while the plaintiff was living with their late mother on L.R No. Nyaki/Munithu/388. It was averred that since the two parcels of land were a distant a part, the deceased allowed her sister to erect temporary structures on the land as a shelter and moved in. The defendant averred that the plaintiff was a mere licensee, which terminated upon the death of the valid owner who had helped her acquire land in the Uringu Adjudication Section currently under use by her son, a police officer. The defendant averred that the deceased made all this clear in his written will that the plaintiff was to vacate the land since her children had become of age and were in gainful employment.
9. At the hearing, Mary Comaroo M'Birithia testified as DW 1 and adopted the contents of her replying affidavit dated 28.12.2023 as her evidence in chief. DW 1 told the court that she used to work with the late M.M Kioga advocate as his assistant and manager of the law firm now the administrator of the estate of the deceased. In support of her defense, D.W. 1 produced a copy of the register for L.R No. Nyaki/Mulathankari /355 as D. Exh No. (1), copy of a will by the deceased as D. Exh No. (2) a chief's



letter dated 12.6.2015 as D. Exh No. (3), a demand notice to vacate the land dated 23.8.2023 as D. Exh No. (4) and lastly, a certificate of death dated 27.9.2018 as D. Exh No. (5).

10. In cross-examination DW 1 told the court that there was a permissive entry to the land by the plaintiff since she was privy to all family transactions of the deceased. D.W. 1 said the plaintiff owned land in the Uringu area, which she claimed was smaller in size than the deceased's land. The defendant did not call any other witness and, therefore, closed her defense.
11. At that juncture, parties were directed to put in written submissions by 6.3.2024. The plaintiff relied on written submissions dated 5.3.2024, while the defendant relied on written submissions dated 20.2.2024. On her part, the plaintiff submitted that the ingredients for adverse possession had been established through evidence tendered. Reliance was placed on *Meru Central Farmers' Cooperative Union Ltd vs Ruth Igoki Rintari & another* (2019) eKLR, which cited with approval *Kimani Ruchire vs Swift Rutherford Co. Ltd* (1980) KLR 10.
12. The defendant isolated three issues for determination by the court. On the ingredients of adverse possession, it was submitted that pursuant to Order 37 Rule 7 (2) of the Civil Procedure Rules, a copy of a title extract must accompany a supporting affidavit in a claim for adverse possession; otherwise, the originating summons would be incompetent.
13. The defendant submitted that the plaintiff's evidence fell short of establishing the ingredients of adverse possession as held in *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015) eKLR and *Hughes vs Griffin* (1969) 1 WLR 23. Even though the relationship between the plaintiff and the deceased was not disputed, the defendant submitted that the occupation was permissive and consensual; therefore, the plaintiff was a mere licensee with the authority of the registered owner. Reliance was placed on *Pauline Mpuka vs Mark Mungiria Mugunaa* (2018) eKLR, which was cited with approval in *Munyaka Kuna Co. Ltd vs Bernado Vicezo De Masi* (2018) eKLR.
14. The issue calling for my determination is whether the plaintiff, a sister to the late M.M Kioga advocate, is on the suit's land by virtue of adverse possession. Adverse possession among close relatives has been a subject of court pronouncements. In *Samuel Kihamba vs Mary Mbaisi* (2015) eKLR, the dispute involved a stepson to the respondents; the appellant's entry and occupation were alleged to have been permissive. Allegations that it was actually a gift had been raised. Neighbors and the area chief had been called to testify. On appeal, the court observed that adverse possession was a matter of evidence whose approach, as held in *Wambugu vs Njuguna* (1983) KLR 173, is that the owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it by acts inconsistent with the enjoyment of the soil for which he intended to use it and that the proper way of assessing proof being whether or not the title holder has been dispossessed or has discontinued his possession for a period of 12 years and not whether or not the claimant has been in possession of the requisite number of years.
15. The court cited *Eunice Karimi Kibunja vs Mwirigi M'Ringer Kibunja* (2013) eKLR, where the appellant was a relative in the family claimed to be ancestral land by the respondents; hence, adverse possession could not apply. The court in the cited case had applied strict interpretations of the provisions of the Limitations of Actions Act and the proof of dispossession of the land owner. The court observed that there must also be an animus possidendi as held in *Eliva Nyongesa Lusenaka & another vs Nathan Wekesa Kisumu* Civil appeal No. 134 of 1993. The court said open and willing dispossession means that the owner knows whether actual or by other means of the occupation of the property by the claimant as held in *Francis Gicharu Kariri vs Peter Njoroge Mairu* Nairobi Civil Appeal No. 293 of 2002.



16. As to License, the court cited *Mwinyi Hamisi Ali vs A.G. & Philemon Mwaisaka Civil Appeal No. 125 of 1997*, that adverse possession does not apply where possession is by consent and in a court of law, sympathy takes a second stand as statutes govern the court. The court said consent might be oral, written, or implied, which must be a question of fact that the court must determine. The court said adverse possession where there was a license steps in once the license is terminated as held in *Wambugu vs Njuguna (supra)*. Therefore, the court said consent and such determinations were the critical consideration with regard to adverse possession among relatives and that in determining it, the court cited with approval, *Eunice Karimi Kibunja vs Mwirigi M'Ringerera (supra)*, that a relative on ancestral land cannot be considered a licensee and the test of the consent that was given to the occupant of the land would be the number of years and whether the owner of the land claimed or did not claim it.
17. The court cited *John Baraza Ojiambo vs Veronica Auma Ojiambo & others (2013) eKLR*, on the problematic question a court grapples with on the issue of consent and family relations, such as whether the failure to verbalize the consent would be construed as absence of a consent, if a close relative would evict the occupant merely to prevent time from running against him.
18. The court cited *Rodgers Mwamboje vs Douglas Mwamboje (2014) eKLR*, where a claimant was staying on his brother's land. It held that under African customs, the issue of consent in such a situation was a rebuttable presumption on the claimant, which, as held in *Mbui vs Maranya (1993), KLR 726*, courts cannot overlook the African cultural setup of being mindful of the relatives' welfare in the spirit of the African milk of generosity and kindness, for mutual survival and progress and where Kuloba J warned that adverse possession among relatives must be reasonably qualified and adequately trimmed, otherwise, it could destroy the cherished ideal and sound cultural foundation, hence destabilize the society. The court cited *Peter Mbiri Michuki vs Samuel Mugo Michuki (2014) eKLR* that possession may be physical or constructive.
19. As to whether the doctrine of adverse possession would apply between a mother and a stepson, the court declined to do so, stating that it would create havoc for families and the society of Kenya generally, if the principle of adverse possession applied within families against close relatives.
20. Applying the preceding case law and the distilled principles to the instant suit, the plaintiff has pleaded and testified on how the late M.M Kioga advocates lived with her since childhood at the ancestral home or residence and later on acquired the suit land, allowed her and her family to utilize and construct structures thereon. All these facts were admitted on oath by the defendant in paragraphs 3-10 of the replying affidavit.
21. The point of departure between the plaintiff and the defendant is whether the occupation was permissive or terminated. The defendant pleaded that the deceased brother had told her that his entry was permissive and conditional until the plaintiff's children became of age and capable of fending for themselves. D.W. 1 relied solely on the deceased will that was produced as D. Exh No. (2). In paragraph (viii) thereof, it is stated that the deceased allowed Regeria, his sister, to cultivate the land but was not given the land and should leave the land after his demise for the executors of the will to sell it at not less than Kshs. 5,000,000/= per acre and develop the office plot as part of Mwaromo's heritage and to be invested for her future posterities.
22. The date when the will was made is not indicated. The person in whose presence the will was prepared is missing. The overwriting on the will is not countersigned, which, in my view, raises questions on whether it was the deceased who made it. Other than the defendant, the two other named executors and administrators were not called to testify before this court. P. Exh No. (1) was issued to two executors and left out Joshua Mutwiri Mutea and Oras Murithi Muthee. The basis of how the defendant became the sole registered owner of the suit land instead of the two administrators as per P. Exh No. (2) is



- unclear. P. Exh No. (2) is unclear. P. Exh No. (3) shows that the defendant became the registered owner of the suit land on 26.5.2022 by virtue of Meru Succession Case No. 14 of 2019.
23. Unfortunately, the defendant did not avail before the court the confirmed grant as her evidence. Regarding D. Exh No. (4), the notice to vacate was issued in the name of the beneficiaries of the estate. It is dated 23.8.2023. The deceased passed on 18.7.2018. Between the entry into the land in 2000 and 2018, when the registered owner passed on, there is no evidence that the actual owner had asserted rights over the land, gained effective entry, or driven out the plaintiff from the land on account of termination of the license.
 24. It is common practice among Africans to settle down or make provisions to accommodate unmarried sisters or those who divorce or separate or are on land widowed from the ancestral land. DW 1, though a personal assistant and manager of the law firm, was not a close family member to be privy to all the family transactions in general and in particular between what transpired between the deceased and the plaintiff regarding the suit land.
 25. DW 1 failed to call any other close relatives of the deceased, including the deceased own children, to assert superior rights over the claim by their aunt, the plaintiff. The date when the will was made, and the witnesses who were present when the deceased asserted rights over the suit land in my view, were crucial to corroborate the defense by the defendant that there was a permissive entry, which terminated upon the children of the plaintiff becoming adults.
 26. Even if we were to believe the evidence of DW 1 that the permissive entry was terminated either upon the plaintiff's children becoming adults, PW 2 told the court that the plaintiff and himself went into the land at the age of 22 years, but has now been able to found a family and settle them on the land. The inference, therefore, would be that the plaintiff, after her children became adults, was living there not as a licensee but as an adverse possessor. There is no evidence that the occupation since 2000 was interrupted by the deceased before he passed on in 2018 or so soon after that he passed on in 2018. The defendant waited until 2023, which was close to five years, to issue a notice to vacate the land. The reason for the delay in effecting the wishes of the deceased to have the plaintiff vacate the land has not been explained.
 27. The reason to disentitle the plaintiff of the land simply for purposes of its disposal to develop the office plot becomes more suspicious when the beneficiaries of the estate were not called to testify to confirm the same by the defendant. The relocation of the plaintiff by the deceased from the ancestral land to the suit property and allowing her uninterruptedly to occupy, live, and develop the land for close to 18 years before the demise, in my view, shows the plaintiff was on the land as of right.
 28. If the deceased had helped the plaintiff to acquire land in the Uringu area, which the defendant has not corroborated through documents, there is no evidence that he deceased ordered the plaintiff out of his land to her registered land. Further, the defendant did not produce any documents that it was the deceased who was the registered farmer of the coffee trees on the land and who was exclusively deriving income for close to eighteen years.
 29. Exh No. 4 (a) – (f) is clear testimony that the plaintiff undertook activities on the land inconsistent with the purpose for which the deceased intended to use his land. See *Wambugu vs Njuguna* (supra). If the plaintiff's children had come of age and were capable of taking care of themselves and the plaintiff, there is no evidence that the deceased summoned them as their uncle and instructed them to resettle on the plaintiff's land in Uringu area. PW 2 told the court that his uncle was a generous and a kind person who willingly allowed them to settle on his land after years of utilizing it. Such evidence of how the deceased allowed the plaintiff to occupy the land unconditionally is consistent with the African spirit and customs of setting less fortunate members of one's family. See *Mbui vs Maranya* (supra).



30. In my consideration, therefore, the plaintiff has met the ingredients of adverse possession to be declared as the owner of L.R No. Nyaki/Mulathankari/355. The defendant is ordered to sign the transfer forms, and the land control board consents in favor of the plaintiff within two months from the date hereof. In default of this, the Deputy Registrar of the court exercises those powers.

31. Costs to the plaintiff.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 15TH DAY OF MAY, 2024**

HON. C K NZILI

JUDGE

In presence of

C.A Kananu

Parties

Miss Gachohi for Maore for the plaintiff

Kaumbi for Mutegi advocate for the defendant and appearing for the estate of the deceased.

