



M’ringara (Suing as the Legal Representative of the Estate of the Late M’muraa M’aritho - Deceased) v Gaitenga & another (Sued as the Legal Representatives of the Estate of the Late M’chokera M’ramare alias Chokera Ramare – Deceased) (Enviromental and Land Originating Summons E005 of 2023) [2024] KEELC 5022 (KLR) (26 June 2024) (Judgment)

Neutral citation: [2024] KEELC 5022 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2023**

CK NZILI, J

JUNE 26, 2024

BETWEEN

SALOME KAINDA M’RINGARA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE M’MURAA M’ARITHO - DECEASED) PLAINTIFF

AND

GLADY’S GAITENGA 1ST RESPONDENT

HENRY KIOGORA M’CHOKERA 2ND RESPONDENT

SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE M’CHOKERA M’RAMARE ALIAS CHOKERA RAMARE – DECEASED

JUDGMENT

1. The court is asked to declare the plaintiff, a legal representative of the estate of M’Muraa M’Aritho, entitled to 1 ½ acres of land out of L.R No. Nyaki/Thuura /1902, held by the defendant as the legal representative of the estate of M’Ndegwa M’chokera alias Chokera Ramare, by virtue of adverse possession. The claim is contained in an originating summons and a supporting affidavit of Salome Kainda M’rintara sworn on 21.2.2019 and a further affidavit sworn on 24.6.2019.
2. At the trial, Salome Kainda M’rintara testified as PW 1. She adopted her witness statement dated 17.8.2023 as her evidence in chief. She told the court that she is the wife of the late M’Muraa M’Aritho and a legal representative to his estate by virtue of a grant dated 15.4.20210 produced as P. Exh. No. (2). PW 1 said that her late husband bought one acre of the land belonging to the late M’chokera in 1980 to be excised from LR. No. Nyaki/Thuura/1902, as per a sale agreement, she produced as P. Exh. No. (4). PW 1 said that her husband took vacant possession and erected a building on the land while awaiting the seller to effect the transfer, only for him to pass on before the process was completed, even though



- he had sought and obtained a land control board consent to subdivide the land. She produced as P. Exh No. (7). P.W 1 said that there was a time when the seller destroyed crops and trees on the land, leading to SRMCC No. 273 of 1984, where the judgment was in her late husband's favor. Additionally, P.W 1 said that the ownership of the land was handled by a panel of elders whose award was that the land be given to her late husband. She said that after the children of the deceased tried to evict her family from the land, she filed both a citation and protest in Meru H.C Succession Cause No. 457 of 2010. She produced the judgment as P. Exhibit No. (6) in which the defendant acknowledged the presence of her family in the land since 1980.
3. As a consequence, the plaintiff testified that the High Court reserved one acre of the estate of the deceased's estate for lack of jurisdiction and directed that she filed this suit within 24 months. P.W 1 said that she and her family have been in exclusive, uninterrupted, and open occupation of the suit land with full knowledge of not only the defendant but also the beneficiaries of the estate of the deceased seller, hence extinguishing any of their rights to the land.
 4. Moreso, P.W 1 relied on a copy of an official search for L. R No. Nyaki/Thuura/1902 as P. Exhibit No. (1), O.B. dated 30.9.2016 as P. Exh No. (3) Chief's letter dated 6.0.2006 as P. Exh No. (5) photographs as P exhibit No.8(a) (b) & (c) and a copy of an order dated 22.6.2023 to defend the suit as P. Exh No. (9).
 5. In cross-examination P.W 1 admitted that she had initially filed Meru HC. E.L.C. No. 11 of 2019 (O.S.) against Mr. M'chokera, who passed on before the suit was finalized. She said that after the death, a representative of the family was nominated to proceed with the suit, which was soon after the succession cause was finalized. P.W 1 was unable to confirm if the previous suit abated, was dismissed, or abandoned.
 6. P.W 1 said that her protest in the probate cause was with regard to 1 ½ acres of the land her late husband had bought from the deceased, but the half an acre was on account of compensation for the destroyed crops. P.W 1 clarified that her husband had initially bought another acre where he obtained a title deed from the deceased, who had warned his children not to interfere with the undisputed portion.
 7. Moreover, P.W 1 said that entry into the land was initially permissive until a panel of elders convened a meeting before the area chief, where it was resolved that the seller give the buyer's family 1 ½ of the land. P.W 1 said that after threats from the defendants, an order to maintain the status quo was issued before Hon. Justice Gikonyo, which order, unfortunately, was disregarded by the defendants. Additionally, P.W 1 said that she only stopped utilizing the land, which has remained unoccupied, after the succession case was filed and an order to maintain the status quo was issued, stopping the defendants from disposing of the land. P.W 1 father said that the defendants had ignored the status quo order by leasing out the land to a third party, who is on the land contrary to the said orders. P.W 1 said that there was a time she reported to the clan over the dispute only for the threats from the defendants to escalate, leading to her seeking and obtaining a court order. Similarly, P.W 1 stated that she lodged a caution against the title registrar on 5.4.2018.
 8. P.W 1 said that she had made developments on the land, which included a store, cattle shed pit latrine, and a living house. She said that the defendant had been issuing threats to her to block her use and occupation of the land, and his development is still on it. Furthermore, P.W 1 said that her other portion next to the disputed portion was where she was occupying. In re-examination, P.W 1 said that her late father's homestead was on the undisputed 1 acre of land.
 9. Henry Kiogora M'chokera testified as DW 1 and adopted his replying affidavits sworn on 14.2.2024 and 6.3.2024 as his evidence in chief. He further relied on originating summons dated 21.2.2019 in Meru E.L.C. No. 11 of 2019 as D. Exh No. 1(a), a confirmed grant of letters of administration as D.



- Exh No. 1(b), replying affidavit by his late brother in Meru ELC No. 11 of 2019 as D exh No. 2(a) – (c), case summary as D. Exh No. 2(f), two affidavits as P exhibit No. 2(d) and (e), death certificate as D. Exhibit No. (3), notice of motion dated 30.10.2022 as D. Exh No. (4) and a ruling dated 7.12.2022 as D. Exhibit No. (5).
10. DW 1 said that his late brother had explained the history of the land in D. Exh No. 2(a) to the effect that the plaintiff's deceased husband had sued his late father before the Land Disputes Tribunal (L.D.T) in 2008, which proceedings indicate that there was no occupation of the land at the time. DW 1 said that the L.D.T. award was never enforced against them since the High Court eventually set it aside. Additionally, DW 1 said that the plaintiff's parcel of land next to the disputed part L.R. No. 1901 approximately 3 acres in size with a live fence all around whose development were the ones captured by P. Exh No. 8(a) – (c). DW 1, however, admitted that the plaintiff's cattle shed was occupying part of the disputed land, which was approximately five to ten meters by three to five meters covered by a wooden structure. DW 1 confirmed that L.R No. 1901 was curved out of their land.
 11. In cross-examination, DW 1 said that the deceased only occupied the disputed land for 6 years, after which he was evicted only to file an L.D.T. case whose award was never executed but was later set aside by the High Court. DW 1 admitted that P. Exh No. 4 was executed by his late father in 1980 for one acre. DW 1 told the court that he did not have a copy of the H.C. Judgment setting aside the L.D.T. award, nor did he have a copy of the restriction in the Meru E.L.C. No. 11 of 2019.
 12. As to the land control board consent and an application, D.W 1 confirmed that it related to LR No. 1902 and not L.R. No. 1901. Regarding D. Exh No. 1(b), P.W 1 said the 1 ½ Ha of land was occupied by P.W 1, which was duly sold to the plaintiff's late husband by his father.
 13. Joseph Mwiti M'Itambo testified as D.W 2 and adopted his replying affidavits sworn on 28.5.2019 23.7.2019 as his evidence in chief. He confirmed that the plaintiff's late husband had bought 3 acres of land from the late M'Ndegwa M'chokera. D.W 2 said Meru E.L.C. No. 11 of 2019 was over the same suit as the instant suit where he was a witness and stood by his witness statement that PW 1 was occupying a separate land as L.R No. 1901, distinct from the disputed 1 acre that she was claiming. D.W 3 was Angelo Muchena, who adopted his replying affidavit sworn on 28.5.2019 filed in Meru E.L.C. No. 11 of 2019. He confirmed that the deceased had bought 3 acres, which are under the plaintiff's occupation, next to the disputed portion.
 14. D.W 3, in cross-examination, admitted that he was not privy to the two sale agreements made in 1970 and 1980 and hence could not confirm the disputed 1 acre of land from L.R. No. 1902. DW 3 confirmed that even though an L.D.T. award was made in 2008, it was never executed against the defendants as regards the alleged 1 acre of land.
 15. At the closure of the defence case parties were directed to put in written submission by 17.6.2024.
 16. Adverse possession as defined in the Blacks' Law Dictionary 11th edition, page 67. Is the enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim continuous, exclusive, hostile, open, and notorious occupation. In *Mtana Lewa vs. Kahindi Mwangandi* (2015) eKLR the court cited *Karnataka Board of Wakf vs Government of India & others* (2004) IO SCC 779 that;

“In the eye of the law, an owner would be deemed in possession of a property so long as there was no intrusion. Non-use of the property by the owners, even for a long time, won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting a hostile title in denial of the title of the true owner. It is a well-settled assumption



that a party claiming adverse possession needs to prove that his possession is nec vi, nec clam nec precario....

It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile, and continued over the statutory period."

17. An adverse possessor is entitled to the land held in denial of the title of the valid owner as held Songoi vs Songoi (2020) eKLR demonstrate;
 - 1) On what date he went into possession?
 - 2) What was the nature of his possession?
 - 3) Whether the fact of possession was known to the other party
 - 4) For how long the possession had continued?
18. In Wambugu vs Njuguna (1983) KLR 172, the court observed that adverse possession involves dispossession of and discontinuance of possession of the valid owner through its inconsistent enjoyment of the soil, for which he intended to use the land. The court said that the proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or had discontinued his possession for the period of 12 years in a non-permissive, non-consensual, exclusive, open, actual, and notorious manner.
19. As to adverse possession out of an aborted sale agreement in Nteere vs Marangu ELC E003 of 2021 (2024) KEELC 4446 (KLB) 29 May 2024 Judgment) the court cited Public Trustees vs Wanduru Ndegwa (1984) eKLR that the limitation period will begin to run from the date of the payment of the purchase price in full and the last installment of it. Such acts of adverse possession or time for adversity can be interrupted if the valid owner asserts visits or makes an effective entry to direct out the adverse possessor (See Githu vs Ndeete (1984) KLR 776.
20. Applying the preceding case law to the facts of this case, the plaintiff pleaded that the late registered owner sold to her husband 3 acres in 1970 and later in 1980, another 1 acre out of L.R No. Nyaki/Thuura/1902, where after they were to and obtain a land control board consent following its application. She produced a copy of an official search limited grant, a sale agreement dated 10.11.1980, a letter of consent to subdivide the land, and photographs showing developments on the land.
21. The official search shows that the title for L.R. No. Nyaki/Thuura/1902 belonged to Chokera Ramare. P. Exh No. 4, the sale agreement was between the registered owner M'chokera M'Ramare as the seller for 1 acre out of L.R No. Nyaki/Thuura/1902 for Kshs.4,000/= . A deposit of Kshs.1,600/= was paid on 10.11.1990. Parties were to attend a land control board meeting on 28.2.1981. Possession was to be taken up upon the signing of the agreement, while the balance of Kshs.2,400/= was to be cleared by the completion date of 30.4.1981.
22. The plaintiff testified that her late husband cleared the purchase price, and a Land Control Board consent was signed and obtained on 2.7.1983 as per P. Exh No. (7) to transfer the land to her late husband, but the seller passed on 18.2.1984 before the transfer was effected. In P. Exh No. (6) the court invoked Rule 41 of the probate & rules to isolate the disputed portion from the estate of the deceased for this court to determine the plaintiff's rights or interest. Before the L.D.T. proceedings and the award, the issue of the sale agreement and the consent dated 23.7.1982, as well as the clearance of the total purchase price, was determined on 18.11.2008. D. Exh No. (5) shows that the former suit between the plaintiff and the late M'Ndegwa Ncokera had abated by 13.7.2022.



23. The defendant takes the view that the former suit abated a fresh suit could not be brought on the exact cause of action as per Order 24 Rule 7 of the Civil Procedure Rules and (2) thereof relates to an abatement of a suit but not the cause of action. Suits against the estate of a deceased person are brought by or against the legal representative of the estate.
24. The plaintiff does not deny that the former suit abated, and an application to review it dated 3.10.2022 was dismissed on 7.12.2022 as per D. Exh No (5). Instead of appealing against the said order or applying for review, the plaintiff lodged this suit on 18.8.2023.
25. In Rebecca Mijide Mungole & another vs. KPLC (2017) eKLR, the court observed that where a suit abates, no fresh suit can be brought on the exact cause of action. In Said Sweilem Gheithan Saanum vs Commissioner of Lands and Others (2015) eKLR, the court said Sections 1A & 1B of the [Civil Procedure Act](#) could not be a panacea to heal every sore in litigation, and neither was it a license to the parties to ignore or contravene the law and its rules of procedure. See Jeniffer Atieno Mugambo vs South Nyanza Sugar Co. Ltd (2000) eKLR, See Gathoni Wahome Vs Kabuchi Rwario & others (2017) eKLR.
26. In Charles Mungai Nyanguthie & another vs Geoffrey Gitau Njuru & others (2019) eKLR the court said a cause of action as an act on the part of the defendant which gives the plaintiff his case of complaints as held in William Muinthe Kilundo vs Peter K. Wambua & others (2018) eKLR.
27. The cause of action pleaded herein is the same as the one pleaded in the abated suit. It is the exact cause of action that the plaintiff is advancing against the estate of the deceased, now represented by the defendants, after their brother, the defendant in the earlier suit, passed on in 2021 and was not substituted by July 2022 in the former suit. Order 24 Rule 7(1) Civil Procedure Rules outlaws such an abuse of the court process to revive an abated suit by filing a fresh suit.
28. As to proof of adverse possession, there is no denial that there was a sale agreement followed by vacant possession being handed over and, after that, a land control Board consent in 1982. The defendant has not denied that the sale agreement land control board application and land control board consent were signed and obtained by the deceased. The parties went before the L.D.T. and confirmed that there was a sale agreement, Land Control Board consent, and the taking of vacant possession.
29. After the land control board consent was not effected after six months, the sale agreement became void. Entry and occupation by the plaintiff's late husband on the land became hostile to the title held by the defendants. There is no evidence of effective entry and eviction of the plaintiff from the suit land. There was also no refund of the purchase price. The plaintiff had not admitted ownership rights of the defendant. That is why the plaintiff has been consistent even with the succession cause. At the time the defendant filed the succession cause, the 12 years of adversity in favor of the plaintiff had elapsed. The right of the valid owner had been extinguished in favor of the plaintiff. The plaintiff has not invoked the doctrine of customary trust or proprietary estoppel as an alternative to a cause of action based on adverse possession. Had the suit not been caught up by Order 24 Rule (7) of the Civil Procedure Rules, as alluded to above, I would have declared the plaintiff entitled to adverse possession.
30. The upshot is that I find the suit incompetent. It is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 26TH DAY OF JUNE, 2024

In presence of

C.A Kananu/Mukami



Karanja for plaintiff

HON. C K NZILI

JUDGE

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