



M’Mwithiga & 4 others v M’Rugongo (Sued as the legal administrator of the Estate of Mwamba Ikiugu - Deceased) (Environmental and Land Originating Summons 28 of 2019) [2024] KEELC 7380 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7380 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 28 OF 2019
CK YANO, J
NOVEMBER 8, 2024**

BETWEEN

**SABERA KARANYAMA M’MWITHIGA 1ST PLAINTIFF
JOSEPH KANG’OROTO MWITHIGA 2ND PLAINTIFF
EDWARD GIKUYU 3RD PLAINTIFF
SAMSON KAIGERA MWITHIGA 4TH PLAINTIFF
FREDRICK MURURU MWITHIGA 5TH PLAINTIFF**

AND

GEOFFREY MUTUMA M’RUGONGO (SUED AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF MWAMBA IKIUGU - DECEASED) DEFENDANT

JUDGMENT

1. The plaintiffs commenced these proceedings vide the originating summons dated 17th June 2018 and filed in court on 18th June 2018, against the defendant. The plaintiffs’ claim is that they are entitled to be registered as proprietors by adverse possession of all that parcel of land known as LR. No. ABOOTHUGUCHI/RUIGA/456 in place of the present registered proprietor. The plaintiffs are seeking for determination of the following questions-;
 1. Whether the plaintiffs have been in continuous, open, peaceful, quiet and undisturbed possession, occupation and user of all that parcel of land known as Abothuguchi/Ruiga/456 which they claim proprietorship pursuant to the doctrine of adverse possession by virtue of having occupied the same for a period of over 12 years.



2. Whether the defendant is the Administrator of the estate of Mwamba Ikiugu – deceased having been appointed on 17th July, 2018 in succession Cause No. 256/2005 at the High Court of Kenya at Meru.
 3. Whether or not Perista Kigetu M’Rugongo (deceased) is the registered owner of land Reg. No. Abothuguchi/Ruiga/456 and was the initial administrator of the estate of Mwamba Ikiugu in High Court at Meru Succession cause No. 256/2005 pursuant to which she acquired registration through a certificate of confirmation of grant issued on 9th October, 2006.
 4. When did the period of adverse possession commence and how long has the same run.
 5. Whether the 1st, 2nd, 3rd, 4th and 5th plaintiffs have extensively developed the suit land.
 6. Whether the 1st, 2nd, 3rd, 4th and 5th plaintiff’s occupation and possession of land Reg. No. Abothuguchi/Ruiga/456 took place with the full knowledge of the defendant who is the administrator of the estate of Mwamba Ikiugu- deceased vide Meru High Court succession Cause No. 256/2005 and the previous administrator one Perista Kigetu M’Rugongo who is now deceased.
 7. Whether the 1st, 2nd, 3rd, 4th and 5th plaintiff are entitled to reliefs sought.
 8. Who should pay the costs of this suit.
2. The plaintiffs are seeking for orders that;
- a. A declaration that the 1st, 2nd, 3rd, 4th and 5th plaintiffs are entitled under Section 38 of the Limitation of Actions Act (Cap 22) Laws of Kenya to be registered as the proprietors by adverse possession in lieu of the present registered proprietor of all that parcel of land known as No. Abothuguchi/Ruiga/456 on which the plaintiffs have been in peaceful undisturbed, uninterrupted and continuous possession user and occupation for more than 12 years and an order that the plaintiffs be registered as the owners of land parcel No. Abothuguchi/Ruiga/456.
 - b. An order that the defendant do execute a valid transfer instrument for land parcel Abothuguchi/Ruiga/456 in favour of the 1st, 2nd, 3rd, 4th and 5th plaintiffs and in default the executive officer of the court be empowered to execute such a transfer instrument.
3. The summons was supported by the affidavit of the 1st, 2nd, 3rd, 4th and 5th plaintiffs all sworn on 17th June, 2019. The 1st plaintiff avers that she lives on land Reg. No. Abothuguchi/Ruiga/456 (hereinafter referred to as the suit land). That she is 87 years old and has lived on the suit land since 1954 when she got married. The 1st plaintiff states that she lives on the land with her 5 children and grandchildren and that she has buried her husband M’Mwithiga M’rutere on the suit land as well as her child, Nturibi Kananira.
 4. The 1st plaintiff avers that she occupies and uses 0.66 acres of the suit land has annexed a green card of the land and certificate of confirmation of grant marked S.K.M 1 and 2. The 1st plaintiff states that the suit land was initially registered in the name of Mwamba Ikiugu in 1965 but was subsequently transferred into the names of Perista Kigetu on 13th March, 2007 vide succession cause No. 256/2005.
 5. The 1st plaintiff avers that she has extensively developed the suit land by among others building her house, planted trees, fruit trees and bananas. She has annexed photographs of the said developments marked SKM 3. The 1st plaintiff states that her occupation of the land has been open, public, exclusive



and continuous and has never been disturbed by the family of the deceased since taking possession. That her possession has been peaceful for over 50 years.

6. In his supporting affidavit, the 2nd plaintiff claims to have occupied, used, developed and lived on a portion of the suit land also measuring 0.66 acres since 1960 when he was born. That he lives therein together with his wife, children and grandchildren. He states that his occupation has been open, public, exclusive and continuous without disturbance by the family of the deceased for over 40 years and have no other place they call home. He has also annexed copies of green card of the land, certificate of confirmation of grant and photographs.
7. The 3rd plaintiff avers that he has lived, occupied, developed and used a portion of the suit land measuring 0.66 acres since 1972 when he was born and has been thereon together with his family who comprise his wife, children and grandchildren. That their peaceful occupation of the land is now over 40 years and they have no other place they call home other than the suit land. He too annexed copies of the green card, certificate of confirmation of grant and photographs.
8. The 4th plaintiff avers that he also occupies and uses 0.66 acres of the suit land together with his family. That he was born and has lived thereon since 1978. He has also annexed copies of the green card, certificate of confirmation of grant and photographs. He states that he has been in peaceful occupation of that land for over 40 years.
9. On his part, the 5th plaintiff avers that he was born in 1980 and has since then occupied, used and developed a portion measuring 0.66 acres out of the suit land. That he has been in peaceful occupation together with his family for over 39 years and have no other place they call home other than the suit land. He also exhibited copies of the green card, certificate of confirmation of grant and photographs.
10. In response to the claim, Geoffrey Mutuma M'Rugongo the defendant filed a replying affidavit dated 19th August 2019. He avers that he is the administrator of the estate of Mwamba Ikiugu by dint of a grant of representation issued to the deceased's daughter and the deponent's mother, Perista Kigetu (now deceased) in Meru High Court Succession Cause No. 256 of 2005. That he is yet to petition for grant over the estate of Perista Kigetu (deceased) and that the estate of Mwamba Ikiugu (deceased) is no longer in existence by operation of the law. That the grant was effectuated during the lifetime of Perista Kigetu in 2007. The deponent states that he is not the legal representative of the estate of Perista Kigetu to administer her estate. It is therefore his contention that the suit is a non starter and incompetent as no grant either limited or otherwise has been issued over the estate of Perista Kigetu (deceased)
11. In further reply, the defendant states that the suit land was registered in the name of Mwamba Ikiugu (deceased) who lived thereon with his only child and the defendant's late mother, Perista Kigetu (deceased). That Mwamba Ikiugu (deceased) passed on in 1969 and that though she got married in the same year, Perista Kigetu (deceased) continued cultivating the land exclusively. That perista Kigetu (deceased) filed succession cause in Meru High court being succession cause No. 256 of 2005 in respect of the estate of Mwamba Ikiugu (deceased) and was registered as proprietor by transmission of the suit land and title issued to her on 19th April 2007. That the deceased then built a permanent structure on the land and continued cultivating it.
12. The defendant states that unknown to his late mother, the plaintiffs hatched a plan to wrestle the land from her and filed an application for injunction in which the 2nd plaintiff used the orders issued to bring the rest of the plaintiffs who are the 2nd plaintiff's mother and siblings into the land, vandalized the building put up by Perista Kigetu (deceased). That the plaintiffs' attempt to revoke the grant issued to Perista Kigetu (deceased) in 2006 was unsuccessful. It is the defendant's contention that his late mother was fought on account of her gender as a woman, but that fact was frowned by the succession



court. That in view of the foregoing, the plaintiffs cannot assert that they were in peaceful and quiet occupation of the suit land from 2007 when they evicted the defendant's mother, since there was a suit succession cause No. 256 of 2005 which was running until on 18th December, 2018 when judgment was delivered. That time stopped running due to the prosecution of the said succession cause. The defendant asked the court to dismiss the plaintiffs' suit with costs to him.

13. At the hearing, the parties herein testified and adopted the averments in their affidavits and witness statements and called witnesses. The parties also filed written submissions through their advocates on record.
14. I have considered the parties' pleadings, submissions and the applicable law. Before deciding whether the plaintiffs have proved their claim for adverse possession, I should as a preliminary issue first determine whether the defendant herein was rightly sued. The suit land was originally registered in the name of Mwamba Ikiugu (deceased) but devolved to his daughter Perista Kigetu (also deceased). Pursuant to proceedings in Meru High Court succession cause No. 256 of 2005, the defendant who is a son to Perista Kigetu (deceased) pleaded that he is yet to petition for grant over the estate of Perista Kigetu (deceased). In paragraph 8 of his replying affidavit, the defendant specifically pleaded that he is not the legal representative of the estate of Perista Kigetu (deceased). That the suit against him is incompetent and a non-starter. The defendant made it clear that he had not taken out any letters of grant over the estate of his late mother. This brings into question the capacity of the defendant in the suit.
15. In the case of Alfred Njau Vs City Council of Nairobi (1983) KLR 625, the Court of Appeal held inter alia, that:-

“... “Locus standi” literally means a place of standing and refers to the right to appear or be heard in court or other proceedings and to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceedings.”
16. In the case of Mwinyi Hamisi Ali Vs Attorney General & Another [1997] eKLR, the Court of Appeal stated inter alia that “adverse possession can only be claimed against a property registered owner”. In this case, the registered proprietor of the suit land is Perista Kigetu (deceased) and not the defendant. Whereas the defendant is a son to the deceased, he is yet to take out letters of administration in respect to the estate of his late mother. Whereas the death of a proprietor does not extinguish a claim of adverse possession, it is my view that a suit could only be brought against the estate of the deceased or the legal representative and not a beneficiary who is yet to take out letters of administration in respect of that estate. In the instant case, the estate of perista Kigetu (deceased) has not been sued. The defendant does not have a grant yet in respect of the estate of the deceased. He has simply been sued because he is a son to the deceased. It has not even been shown whether he is the only heir of the estate of the deceased. It is to be noted that the defendant categorically stated that he is not the legal representative of the estate of the deceased. Even with that averment, the plaintiffs did not deem it fit to have a citation filed to compel the defendant to take out letters of administration. In the absence of a grant, it is my opinion that the defendant does not have the legal capacity to be sued in the manner the plaintiffs herein have done. It is not clear what claim the plaintiffs can urge against the defendant who is not a legal representative of the estate of the deceased registered proprietor. Like in all civil suits, a claim for adverse possession must be against a person who has the legal capacity or locus standi to be sued.



17. In the case of *Julian Adoyo Ongunga Vs Francis Kiberenge Abano, Migori Civil Appeal No. 119 of 2015*, Mrima J in a persuasive decision had this to say on the issue of a party filing a suit without having obtained a limited grant-;

“Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth noting that the issue of locus becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

18. To paraphrase the above decision, I would say that a party without locus standi in a civil suit lacks the right to defend that suit. In this case, the defendant is not the registered proprietor of the suit land. The defendant is also not the legal representative of the estate of the registered owner of the land. There is no evidence that defendant has even petitioned for letters of administration in respect to the estate of the deceased. Therefore, the defendant, in my view lacks the legal capacity to defend the suit.
19. Section 82 of the *Law of Succession Act* gives personal representatives of a deceased person’s estate the power to “enforce, by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arising out of his death, to his personal representatives.” It is trite law that the estate of deceased person is vested in the legal representative. Therefore, one can only institute or enforce, and/or defend a suit on behalf of a deceased person once he has been appointed a personal representative to such estate. Such appointment under the *Law of Succession Act* can only be by way of obtaining a full grant or a grant limited for purposes of instituting, and prosecuting and or defending the suit which would be ad litem. In this case, there is no such grant. As demonstrated by the exhibits produced by the plaintiffs, the suit land LR. No. Abothuguchi/Ruiga/456 was registered in the name of Mwamba Ikiugu (deceased) in 1965 but was subsequently transferred to Perista Kigetu on 13th March 2007 vide Meru High court Succession Cause No. 256 of 2005. The same is still registered in the name of Perista Kigetu M’Rugongo (deceased). Among the reliefs sought by the plaintiffs is an order compelling the defendant to execute a valid transfer instrument for the suit land in the plaintiffs’ favour. There is no evidence to show that the defendant is the administrator of the estate of any of the deceased persons. The defendant’s name does not appear on the certificate of confirmation of Grant produced as a beneficiary. It is therefore difficult how the orders sought are directed to the defendant who is neither the registered proprietor of the suit land nor an administrator of the estate of the deceased proprietor. It is instructive to note that the defendant expressly denied being an administrator of the estate of the deceased. The defendant is just a son to Perista Kigetu (deceased). In my considered view, the relationship of the defendant as a son of the deceased registered proprietor of the suit land is not sufficient to give him the capacity to be sued and to defend the suit in respect of a property which is registered in the name of the deceased. One’s relationship to the deceased owner does not clothe such a party with the legal capacity or the locus standi. It is the limited or full grant which does. It is therefore my finding that the plaintiffs’ suit as drawn is misconceived and incompetent and thus legally untenable.
20. In the result, I hereby strike out the plaintiff’s suit with costs to the defendant.
21. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF NOVEMBER, 2024.



In the presence of
Court Assistant – Tupet
Kaimenyi for plaintiffs
Mrs Muia for defendant

C.K YANO

ELC JUDGE

