



**Muthoni (Suing as the Legal Representative of the Estate of Benjamin M'Mailutha Kailibi (Deceased)) v Liungia & 2 others (Environment & Land Case E002 of 2021) [2024] KEELC 13622 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13622 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE E002 OF 2021  
CK YANO, J  
DECEMBER 5, 2024**

**BETWEEN**

**CONSOLATA MUTHONI ..... PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF BENJAMIN  
M'MAILUTHA KAILIBI (DECEASED)**

**AND**

**CHARLES LIUNGIA ..... 1<sup>ST</sup> DEFENDANT  
JUSTUS BENJAMIN IBUI ..... 2<sup>ND</sup> DEFENDANT  
ATANASIO M'EKANDI M'MUKIRI ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. For determination is the plaintiff's Originating Summons dated 11<sup>th</sup> January, 2021 and filed in court on 13<sup>th</sup> January, 2021. In the Originating Summons, the plaintiff is seeking for determination of the following questions;
  1. Whether the 1<sup>st</sup> respondent is registered as the proprietor of Land Reference No. Akithi III/3945.
  2. Whether the 2<sup>nd</sup> respondent is registered as the proprietor of Land Reference No. Akithi III/642.
  3. Whether the 3<sup>rd</sup> respondent is registered as the proprietor of Land reference No. Akithi III/3007.



4. Whether the applicant has been in occupation of LR No. Akithi/ III 3945, 642 and 3007 openly, continuously, uninterruptedly, and adversely to the respondents' title for a period in excess of 12 years.
  5. Whether the respondents' title to Land Reference No. akithi III/3945, 642 and 3007 has been extinguished by dint of Section 38 of the *Limitation of Actions Act* Cap 22 Laws of Kenya.
  6. Whether the applicant has now acquired absolute ownership of LR. No. Akithi III/3945, 642 and 3007 by way of adverse possession.
  7. Whether the applicant is now entitled to be registered as the proprietor of Land Reference No. Akithi/III/3945, 642 and 3007.
  8. An order that the applicant be registered as the proprietor of land Reference No. Akithi III/3945, 642 and 3007.
  9. Whether the applicant is entitled to the costs of the suit.
2. The summons is supported by the affidavit of CONSOLATA MUTHONI sworn on 11<sup>th</sup> January, 2021. The plaintiff avers that she is the granddaughter of Benjamin M'Mailutha Kailibi (deceased) and the legal representative of his estate. That she knew very well the history of her grandfather's land reference No. Akithi III/1475. The plaintiff states that the said land was situated on a prime area that is at Ngundune Market touching the main Meru Maua Road and bordering the Ngundune Police Station. That her grandfather had developed the land and constructed commercial houses which he rented out to various people doing business including the famous Kanu Office and Mau Mau office.
  3. The plaintiff avers that during the land adjudication exercise between 1988 and 2000, the parcels of land L.R No. Akithi III 3945, 642 and 3007 were moved from other area and placed strategically on the prime part of her grandfather's land 1475 which borders the Ngundune Police Station hence taking away her grandfather's land. That her grandfather raised several objections to the said transfer and placement of the abovementioned parcels on his land but he was not given a hearing and/or fair hearing since he was illiterate and had no one to help him in following up with the said objection.
  4. The plaintiff states that the 1<sup>st</sup> respondent, Charles Liungia, was one of the land committee members and in particular influenced the Land Adjudication Officer to transfer land and that of his relatives and friends in particular Justus Benjamin Ibui who is the brother in law married to his sister. That however, since the transfer and placement of the said parcels on her grandfather's land, the respondents have never taken possession on the ground.
  5. The plaintiff avers that when her grandfather was subdividing and transferring his land to his sons, the area chief conspired and sneaked his son's name to get a piece of the land and her grandfather filed a case in court Meru HCCC No. 47 of 2011. That in the said Meru, HCCC No. 47 of 2011, Charles Liungia offered to be a witness of the chief's son since he knew how he had conspired to take away the plaintiff's grandfather's land.
  6. The plaintiff avers further that her grandfather and his family have lived and openly utilized the said land for more than 7 decades and they are still in possession of the said land.
  7. The plaintiff states that in 1986, she was born in her grandfather's house where she lived most of her life and is the same house now occupied by her uncle and his family. That this is the only land they have and the only place they call home and have nowhere to go.



8. The plaintiff avers that she is advised by her counsel that the respondents' titles and any other person's claim over the said land has been extinguished and she is entitled to be registered as the proprietor under the Limitations of Actions Act Cap 22 Laws of Kenya.
9. In her affidavit, the plaintiff has annexed copies of a Limited Grant, area Map, photographs and copies of the registers.
10. The 1<sup>st</sup> defendant filed a replying affidavit dated 27<sup>th</sup> January, 2021. He states that the applicant is a total stranger to the parcels of land forming the suit property. That at no time was the parcel of land belonging to the late Benjamin Mailutha Kailibi (deceased) situate on the location where the suit land currently stands.
11. The 1<sup>st</sup> defendant states that while it was true that the deceased owned LR. No. Akithi III/1475, he totally denied that the said parcel of land was ever part of the suit lands as alleged or at all.
12. The 1<sup>st</sup> defendant contends that it is not humanely possible to relocate an immovable property like land from one area to another like the plaintiff is inviting the court to believe.
13. The 1<sup>st</sup> defendant states that LR. Nos. Akithii III/642, 3007 and 3945 all originated from him as the absolute owner before he sold and transferred L.R No. Akithi III/ 3945 and 3007 to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively. That at no time have the above stated parcels of land been part of L.R No. Akithi III/1475 which belonged to the deceased, neither had he effected any developments of the same as pleaded or at all.
14. The 1<sup>st</sup> defendant avers that at no time has the family of the deceased or the plaintiff resided, cultivated and/or constructed any buildings or structures on the suit properties.
15. The 1<sup>st</sup> defendant contends that the plaintiff has not demonstrated in her affidavit why the deceased or his representative did not move an appropriate court during the process of adjudication to guard the subject matter if indeed there was any impropriety at the time the suit property was allocated to defendants. That he was not aware of any objection raised either by the deceased or the plaintiff regarding the suit property and even if there had been any such objection, he is advised by his counsel on record that such a decision cannot be challenged at this stage.
16. The 1<sup>st</sup> defendant avers that a close observation of the averments of the plaintiff in paragraph 11 of the supporting affidavit demonstrates wild allegations of corruption and fraud allegedly perpetuated by the 1<sup>st</sup> defendant, but no evidence has been exhibited to support the allegations hence the same should be disregarded as inconsequential.
17. The 1<sup>st</sup> defendant states that prior to disposing part of his parcel of land to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants he was in total and full control and occupation thereof and used to carry out agricultural activities thereon hence it cannot be said that he had never taken possession thereof.
18. The 1<sup>st</sup> respondent states that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents took physical and actual possession of their respective parcels of land after sale and are still in such possession and occupation.
19. The 1<sup>st</sup> defendant states that the averments of the plaintiff in paragraphs 10 and 11 of the affidavit are totally untrue, scandalous and seek to paint him as a dishonest person probably to advance the plaintiff's lies. That in any event, the plaintiff has neither annexed the particulars of the case alluded to in those paragraphs of her affidavit nor the proceedings and/or the decision thereof a fact that would have assisted the court to independently evaluate the veracity of the issues raised.



20. The 1<sup>st</sup> defendant states categorically that the plaintiff's grandfather, the plaintiff or any member of their family have never lived, occupied, cultivated or utilized the suit lands or any part thereof. That some of the photographs annexed to the plaintiff's affidavit were taken outside the suit land.
21. The 1<sup>st</sup> defendant contends that the matter before court is fatally defective as the same is preferred before the time of which the doctrine of adverse possession can apply. That he is further advised by his counsel on record that time for which adverse possession can be invoked does not start running till from the date of registration of a person as owner of the land. The 1<sup>st</sup> respondent states that in the instant suit, registration of the respondents was only effected in 2017.
22. The 1<sup>st</sup> defendant avers that contrary to the plaintiff's averment that her family has been in occupation of the suit land for over 12 years, he has been in control of the land throughout and the only time he relinquished part of it is when he sold the respective portion to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. That the structure the plaintiff alleges is being occupied by her uncle was actually erected by a construction company for purposes of storage of their property and does not qualify to be a residential house.
23. In his replying affidavit dated 27<sup>th</sup> January, 2021, the 2<sup>nd</sup> defendant avers that he is the registered owner of parcel of land LR. No. Akithi III/ 3945 and not the owner of LR No. Akithi III/642 as alleged by the plaintiff. That he is a bona fide purchaser for value of the said parcel of land from the 1<sup>st</sup> defendant herein.
24. The 2<sup>nd</sup> defendant avers that when he purchased the said parcel of land from the 1<sup>st</sup> defendant, the area within which the land is located was under the process of adjudication. That the process of adjudication has already been finalized and he was duly registered as the owner of L.R No. Akithi III/3945 on 8<sup>th</sup> March 2017. The 2<sup>nd</sup> defendant annexed a copy of the title marked "JBI (a)"
25. The 2<sup>nd</sup> defendant states that since he purchased the said land, he has had continuous control over the same for a short period and the 1<sup>st</sup> defendant has been taking care of the same in his absence because he has been working and residing in Nairobi. That he has never seen the plaintiff or her grandfather on the land.
26. The 2<sup>nd</sup> defendant avers that he has never seen or witnessed anyone claiming the said parcel of land or part thereof since he purchased the same. That there are no structures or any other physical developments on his parcel of land or anything that show that any other person has been in occupation or control of the said land.
27. The 2<sup>nd</sup> defendant contends that the suit as filed is totally incompetent as the period of adverse possession cannot start running until after the parcel of land has been registered.
28. On his part, the 3<sup>rd</sup> defendant filed a replying affidavit dated 16<sup>th</sup> March 2022. He states that he was never a party to the alleged litigation between the plaintiff and the 1<sup>st</sup> defendant. That in 1998, he got interested in a parcel of land that was situated within his neighbourhood and established that the land was the property of the 1<sup>st</sup> defendant and the same was available for purchase and occupation. That by an agreement dated 16<sup>th</sup> July, 1998, he bought 0.12 acres of the land comprised in the 1<sup>st</sup> defendant's land parcel Number 642 in Akithi III Land Adjudication Section. The 3<sup>rd</sup> defendant has annexed a copy of the sale agreement marked "AMMI and stated that he paid the full purchase price and took possession of the land.
29. The 3<sup>rd</sup> defendant states that the land was subsequently surveyed and allocated number 3007 within the said adjudication area. That he obtained a sketch map in respect of the land which he has annexed a copy marked "AMM II". That following the conclusion of the adjudication process, he was issued



- with a title deed which remains valid. The 3<sup>rd</sup> defendant states that he has been in exclusive and uninterrupted possession of his entire property since the date of sale.
30. The 3<sup>rd</sup> defendant further states that the 1<sup>st</sup> defendant sued him in Meru CMCC No. 17 of 2015 seeking an order of injunction but no orders were granted. The 3<sup>rd</sup> defendant has annexed copies of the pleadings marked “AMM III.”
  31. The 3<sup>rd</sup> defendant states that the plaintiff has no claim against him and has no interest in the land. That the plaintiff is not the legal representative of the estate of the late Benjamin M’Mairutha Kailibi and her claim has no basis. He urged the court to dismiss the plaintiff’s suit with costs.
  32. In reply to the responses filed by the defendants, the plaintiff filed a supplementary affidavit dated 5<sup>th</sup> February, 2021 and a further supplementary affidavit dated 16<sup>th</sup> February, 2021 wherein she reiterated the contents of her summons and the supporting affidavit. The plaintiff also stated that she has the locus standi to file the suit on behalf of the estate of Benjamin M’Mailutha Kailibi (deceased).
  33. At the hearing, Consolata Muthoni, the plaintiff herein, testified as P.W 1. She was the sole witness for the plaintiff. She was cross examined and re-examined. The plaintiff relied on the contents of her supporting affidavit and supplementary affidavits and adopted her statement dated 11<sup>th</sup> January, 2021 and the annexures thereto which she produced as P exhibits 1 – 11 respectively.
  34. The plaintiff testified that she has lived on the land since the year 1986 when she was born and that her deceased grandfather lived on the land before then. She however, stated the land has been encroached by other people who have subdivided it into parcels No. 3945, 642 and 3007. That the defendants came around the year 2000 claiming the land but were chased away by the plaintiff’s late grandfather. That in the year 2015, when the plaintiff’s grandfather had passed on, the 3<sup>rd</sup> defendant tried to evict them from the land and entered and fenced the land by force. The plaintiff reiterated the contents of her affidavit and urged the court to grant her the orders sought.
  35. When she was cross examined, P.W 1 stated that the limited Grant of Letters of Administration which she produced as P exhibit 1 was issued on 26<sup>th</sup> June 2015 and the purpose of the grant was for the plaintiff to participate in Meru CMC civil suit No. 47 of 2011. She also agreed that before title deeds were issued, adjudication process was carried out in the area. That the plaintiff’s late grandfather raised a complaint, but he was not heard because he was illiterate. P.W 1 stated that she was aware that the defendants have titles for their respective parcels of land which were issued with other titles for the area in the year 2021.
  36. The plaintiff stated that parcel No. 1475 is in the name of her late grandfather, but the title was still in the land’s office. That her grandfather died on 19<sup>th</sup> July, 2014. That the land they stay in belongs to her grandfather, but could not tell the acreage because some people had intruded into the land. The plaintiff accused the defendants of imposing their parcel numbers on her grandfather’s land. That she had not sued the Land Registrar who issues titles or the Land Adjudication Officer because they have not interfered with their land.
  37. Charles Liungia Ngera, the 1<sup>st</sup> defendant herein testified as D.W 1. He relied on the contents of his replying affidavit and adopted his statement dated 22<sup>nd</sup> February, 2022 as his evidence and was cross examined and re-examined. His evidence is that he is the owner of parcel No. 642 while parcel Number 3945 and 3007 belong to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively, while parcel No. 1475 is in the name of Benjamin Mailutha. The 1<sup>st</sup> defendant testified that he sold parcel No. 3945 to the 2<sup>nd</sup> defendant. He denied that the plaintiff or her family have used their parcels of land Nos 642, 3945 and 3007. He



- stated that each of the defendants is using his own land. D.W 1 stated that there was no claim over their parcels even during adjudication process and stated that he got his title in the year 2017.
38. When he was cross examined, D.W 1 stated that he was given the land by his father, John Kirathi Inegu. He denied knowledge of one Peter Ndegwa. He admitted being a committee member in the 1990's but denied being a land committee over the suit parcels of land. He stated that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were using their own parcels while he uses his for cultivation and denied that the plaintiff is using them. He stated that the photographs produced by the plaintiff as exhibits are for houses belonging to the police station and are for structures put up by a construction company.
  39. D.W 1 stated that the deceased's parcel No. 1475 which neighbors the defendants' parcels was subdivided into 6 pieces amongst the children of the deceased.
  40. The 2<sup>nd</sup> defendant testified as D.W 2 and relied on his replying affidavit and adopted his statement dated 22<sup>nd</sup> February, 2022 as his evidence and produced the title deed for land parcel No. 3945 which he stated was issued to him on 8<sup>th</sup> March 2021. He testified that he was sold the land by the 1<sup>st</sup> defendant. He stated that the plaintiff's grandfather owns land parcel No. 1475 which borders the suit parcels of land, and he denied that the suit parcels are part of that land.
  41. Atanasio M'Ekandi M'Mukiri, the 3<sup>rd</sup> defendant, testified as D.W 3. He relied on his replying affidavit and adopted his statement dated 16<sup>th</sup> March 2022 as his evidence. He produced the documents in his bundle as d exh 1-5 respectively. He stated that he bought the land from the 1<sup>st</sup> defendant and has been using it since. He referred to the sale agreement produced as D Exhibit 1.
  42. D.W 3 admitted being sued by the 1<sup>st</sup> defendant but stated that the case was discontinued when he produced his agreement. He stated that Maria Ciothambutu is a grandmother of the plaintiff while Samuel Nkubitu is her father.
  43. The parties filed written submissions through their respective advocates on record. I have read and considered the submissions and there is no need to regurgitate the same.

### **Analysis and Determination**

44. I have considered the pleadings, submissions and the applicable law. The issue for determination is whether the plaintiff has proved her claim for adverse possession. However, before I consider that issue, I should, as a preliminary issue, first determine whether the plaintiff has capacity to institute the suit. It is the defendant's contention that the plaintiff cannot purport to prefer the suit in her capacity as the legal representative of the estate of her late grandfather, Benjamin M'Mailutha Kailibi (deceased) since no grant has been issued to her.
45. The originating summons herein is supported by the plaintiff's supporting affidavit sworn on 11<sup>th</sup> January, 2021 and filed in court on 13<sup>th</sup> January, 2021. The plaintiff has clearly pleaded that she is suing as a legal representative of the estate of the deceased. The plaintiff produced a copy of a Limited Grant of Administration Ad Litem issued to her on 26<sup>th</sup> June 2015 as P exhibit 1. I have perused that grant. The same expressly states that it was limited "to the purposes (of) concluding Meru Chief Magistrate's civil suit No. 47 of 2011." It is therefore evident that the said grant was limited to concluding Meru Chief Magistrate's civil suit No. 47 of 2011. There was no other grant produced by the plaintiff that allowed her institute the suit herein or for any other purpose for that matter, other than the grant issued on 26<sup>th</sup> June 2015.
46. In this case, the plaintiff testified and closed her case on 25<sup>th</sup> October, 2022. Thereafter, the plaintiff filed an application dated 18<sup>th</sup> November, 2022 in which she sought to re-open her case for purposes of



adducing additional evidence. The additional evidence the plaintiff sought to introduce was a copy of a Grant Limited for filing suit on behalf of the estate of Benjamin Mailutha Kailibi (deceased). That grant was issued on 5<sup>th</sup> August, 2021 in Tigania PMC Misc Succession Cause No. E026 of 2021. This suit was filed on 13<sup>th</sup> January, 2021 and the plaintiff had pleaded that she was suing as a legal representative of the estate of the deceased. The grant sought to be introduced during the course of the proceedings herein was issued on 5<sup>th</sup> August, 2021, which was about eight (8) months after the filing of the suit. By a ruling delivered on 12<sup>th</sup> July, 2023, this court declined to grant the plaintiff's request to re-open her case for purposes of introducing the second grant. Consequently, the plaintiff's application dated 18<sup>th</sup> November, 2022 was dismissed with costs to the defendants. That ruling remains in force as the same has not been set aside either on appeal or review. This then brings into question the capacity of the plaintiff in this suit.

47. The issue as to whether a party can file a suit involving a deceased's estate before obtaining a Limited Grant has been the subject of several court cases. The general consensus is that a party lacks the locus standi to file a suit before obtaining a grant limited for that purpose. This legal position is quite understandable in that if the plaintiff or applicant has not been formally authorized by the court by way of a Grant Limited for that purpose, then it will be difficult to control the flow of court cases by those entitled to benefit from the estate. If each beneficiary is allowed to file a suit touching on a deceased's estate without first obtaining a limited grant, then several suits will be filed by the beneficiaries. It is the Limited grant which gives the plaintiff the locus to stand before the court and argue the case. It does not matter whether the suit involves a claim of intermeddling of the estate or the preservation of the same. One has to first obtain a Limited Grant that will give him/her the authority to file the suit. The leave of the court is not required before one seeks a grant limited to the filing of the suit.
48. In this case it is my view that the plaintiff ought to have sought a Limited Grant first before filing the suit. In other words, a Grant Limited to the filing of a suit ought to be issued first before the suit is filed.
49. In the case of *Morjaria Vs Abdalla* (1984) KLR, 490 holding No. 7 of the court of Appeal reads as follows at page 491:-

“Notwithstanding that the Grant of Letters of Administration Ad Colligenda Bona was not a form of grant appropriate for this case and that it did not follow Form 47 in the first schedule to the *law of Succession Act* as provided by Rule 36(2) of the Probate and Administration Rules, the grant was specifically limited to “the purpose only” of representing the appellant in his appeal and those words in themselves constituted a valid grant under rule 14 enabling the appellant's son and his step mother to represent the appellant in this appeal.”

50. In the case of *Julian Odoyo Ongunga Vs Francis Kiberenge Abano Migori* Civil Appeal No. 119 of 2015 Justice A Mrima 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. Locus standi relates 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 standi 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.”



51. The effect of the above cases is that for a party to have locus standi and appear in a case involving a deceased person, he or she must first obtain a Grant Limited for that purpose.
52. There is no dispute that the plaintiff did not obtain a Limited Grant allowing her to file this suit. Such a grant is the key which allows the plaintiff access to the court. Without a limited grant being issued allowing the filing of the suit the plaintiff no doubt had no capacity to institute the suit on behalf of the estate of the deceased. This is despite the validity of the suit or the strength of the case. The court cannot hear the suit as the initiator thereof lacks the capacity to file the suit. The suit as initiated becomes void ab initio and cannot be resuscitated by the issuance of a subsequent Limited Grant. The mere fact that the plaintiff is a grand daughter of the deceased is not sufficient. That relationship does not give the locus standi to the deceased's relative to file suits before obtaining Limited Grants. One's relationship to the deceased does not clothe such a party with the locus standi. It is the Limited Grant which does. Since the plaintiff did not obtain a Grant Limited to the filing of the suit, I do find that the suit herein cannot be sustained. The plaintiff's suit as drawn is misconceived and incompetent and thus legally untenable.
53. In the result, I hereby strike out the plaintiff's suit with costs to the defendants.
54. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 5<sup>TH</sup> DAY OF DECEMBER, 2024.**

In the presence of

Court Assistant-Lenah

Gikunda holding brief for Kiogora Arithi for 3<sup>rd</sup> defendant

2<sup>nd</sup> defendant in person

No appearance for the advocates for the 1<sup>st</sup> & 2<sup>nd</sup> defendant

**C.K YANO**

**JUDGE**

