



**Kwaria (Suing on Behalf of the Estate of Peter Ritara -Deceased and of his own behalf) ((Suing on Behalf of the Estate of Peter Ritara -Deceased and of his own behalf)) v Muriira & another (Environment & Land Case 48 of 2019) [2023] KEELC 355 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 355 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MERU**  
**ENVIRONMENT & LAND CASE 48 OF 2019**  
**CK NZILI, J**  
**JANUARY 25, 2023**

**BETWEEN**

**GILBERT KINYUA KWARIA ..... PLAINTIFF**  
**(SUING ON BEHALF OF THE ESTATE OF PETER RITARA -DECEASED AND OF HIS OWN BEHALF)**

**AND**

**MOSES MURIIRA ALIAS MURIIRA MWENDA ..... 1<sup>ST</sup> DEFENDANT**  
**PETER N. KIRIGUA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff by a plaint dated June 13, 2019 sued the defendant for fraudulently disposing of LR No Nkuene/Nkumari/2361 which he has occupied for 15 years. He sought for the land to revert to the estate of the late Peter Ritara or in the alternative to be declared as the owner by virtue of adverse possession. The plaint was accompanied by witnesses' statement and list of documents dated June 23, 2019 and December 1, 2021 respectively.
2. By a defence dated October 6, 2019 the defendant denied the allegations in the plaint. Instead he averred that it was the plaintiff who was seeking to fraudulently obtain the land yet he holds a lease agreement over the land; that guardianship could not exist without legal documents; that he was purporting to convert a lease agreement dated April 28, 2006 into a sale agreement; that he had failed to vacate the land despite a notice to do so in 2018; that he had obtained a limited grant in collusion with the area chief and lastly, for blackmailing him to surrender his inheritance claiming a share of the land unjustly and for alleging he took care of the joint owner of LR No 236. The defence was accompanied by a list of witness statements, list of documents dated October 4, 2021 and a preliminary objection dated September 17, 2020 on account of locus standi and the suit being time barred.



3. PW 1 adopted his supporting affidavit sworn on June 13, 2019. He testified that the suit land initially belonged to his maternal grandfather (deceased) and stated that Peter Ritara his late uncle had two children. His evidence was that the defendant was his cousin. Regarding the suit land, he said his mother took him to the suitland in 1989 where he used to live with his late uncle Peter Ritara who was alleged to have been mentally unstable. Additionally, PW 1 stated that the father to the defendant one Barnabas Kabira sold a portion of the suitland leaving only one acre for the late Peter Ritara. According PW1 the land had been registered under the name of his late uncle and the defendant Muriira Mwendia as joint owners. During the lifetime of Peter Ritara, PW 1 told the court he took care of him until his death on October 11, 2006 and solely buried him after the other siblings declined to cater for the expenses.
4. After the burial, PW 1 testified that the defendant and his mother threatened to evict him from the land to which he reluctantly conceded to an agreement dated 28.4.2006 to rent the land. Further PW1 said that he has since occupied peacefully and quietly until he conducted a search only to establish an alleged transaction behind his back by other relatives, and on enquiry he was threatened with eviction by the defendant. PW 1 produced a copy of the official search as P Exh No (1), a demand notice as P Exh No (2), burial permit as P Exh No (3), a chief's letter as P Exh No (4), copy of grant ad litem as P Exh No (5) and photographs showing his developments thereon as P Exh No (6).
5. Regarding the defendant's list of documents, PW 1 admitted knowledge of the lease agreement signed between him and the defendant. In short, he said he had occupied the land for 15 years and that it should be equally divided between him and the defendant after the lease due to expire in 2026.
6. PW 1 in cross examination said that he was among the nephews of the deceased and that he had leased a portion of the land up to 2026 after a termination notice was issued to him in 2018. Moreover, PW 1 acknowledged that he had no report showing either the deceased was mentally unstable, he took care of him and or started developments following the lease.
7. Though his mother was alive, PW 1 said that she was married elsewhere and that she had not raised any claim for the suit land. He however insisted that he had been on the land since 1999 and before the land was subdivided into Parcel No 2361 in 2005. Similarly, PW 1 attributed the delay in filing the suit from 2006, since his cousin the defendant was then a minor and was also awaiting a consensus from the relatives. Further, PW 1 testified that the defendant started selling the property to third parties where after he lodged a compliant with the Land Registrar who advised that in the absence of an amicable solution, parties could move to court.
8. PW 1 said that he was the rightful beneficiary of the portion of the late Peter Ritara who died with no surviving beneficiaries as the next of kin, on account of adverse possession, for nursing him during his lifetime and for catering for the burial expenses.
9. PW 2 & PW 3 adopted their witnesses statements dated December 1, 2021 as their evidence in chief confirming that the deceased occupied the suit land during his lifetime together with the plaintiff. PW 2 said that the plaintiff continued to till the land after 2006 up to the filing of the suit. On the sickness of the deceased, PW 2 confirmed the same and clarified that it was the plaintiff who used to nurse take care of him including meeting the burial expenses.
10. The defendant adopted his replying affidavit and written statements dated October 4, 2021 as his evidence in chief and produced a copy of the lease agreement dated April 28, 2006, as D Exh No (1), copy of mutation form dated August 2, 2005, as D Exh No (2), an official search as D Exh No (3), chief's letter dated May 16, 2019 as D Exh No (4) and a demand letter dated November 21, 2018 as D Exh No (5) respectively.



11. In cross examination the defendant acknowledged that the plaintiff was his cousin and that the suitland was a resultant of subdivision of Parcel No 528 initially belonging to their late grand father and mother Ntaare M'Murama. He denied that the plaintiff or his mother were beneficial owners of the land. DW 1 admitted that the parties signed a lease agreement but the plaintiff failed to take vacant possession.
12. In his view the lease agreement was made so that the plaintiff could lend them money to cater for the funeral expenses of the deceased and as a refund to an attempted third-party buyer to the land. He also admitted that the plaintiff was supposed to recoup all those expenses and monies advanced through the lease.
13. DW 1 denied that the deceased had any mental lapses. According to him, the land was jointly owned by him and the deceased. Therefore, DW1 stated that the land belonged to him and not the plaintiff who lacked capacity to claim it since his own mother had no share in the ancestral land. Further, DW 1 refuted the claim that the deceased was during his lifetime and sickness solely relying on the plaintiff for his upkeep.
14. DW 1 denied that he had misled the land officials in registering or lodging the mutation form. Further, admitted, DW 1 that the land was registered under his name while he was a minor to prevent his late father from selling it. He also refuted the alleged limited grant since the plaintiff was not the sole heir or beneficiary of the estate of the late Peter Ritara at the close of the defendant's cause,
15. parties were directed to file written submissions by December 9, 2022. The plaintiff submitted that he deserves the orders sought since the initial land belonged to their joint grandfather but the defendant's father subdivided it into Parcel No's 2358 to 2361, sold parcel No's 2358 to 2366 to third parties, left only Parcel No 2061 for his mentally challenged brother Peter Ritara and left no piece of land for his mother.
16. The plaintiff submitted that the registration was in trust for his late uncle though the mutation form pointed him as a minor which was untrue. In addition, plaintiff submitted that the two joint owners were tenants in common with equal shares as per Section 91 (1) of the Land Registration Act; that given that he took care of his late uncle while alive, which is not contested, he was entitled to his share and the land should revert to the estate of the late Peter Ritara or in the alternative to him by virtue of adverse possession.
17. The court has carefully gone through the pleadings evidence tendered, the submissions and the law. The issues for determination are:
  - a. If the plaintiff has capacity to bring the suit for the estate of the deceased and on his own behalf.
  - b. If the suit is bad in law.
  - c. If the plaintiff has proved any fraud or illegality against the defendant.
  - d. If the plaintiff has proved entitlement to the suit land by virtue of inheritance and or adverse possession.
  - e. If the suit property was jointly owned by the deceased and the defendant or as tenants in common.
18. The plaintiff has pleaded that he brings the suit on behalf of the estate of the late Peter Ritara and on his own behalf by virtue of the long occupation of the land. In support of the estate, the plaintiff produced a copy of Limited grant ad litem under Section 54 and the 5<sup>th</sup> Schedule of the Law of Succession Act issued on June 13, 2019 in Nkubu PMCC Misc. Succession Cause No 31 of 2019.



19. Prior to the defence dated October 6, 2020, the defendant had filed a replying affidavit dated September 17, 2020 admitting that the suit land was jointly registered while he was a minor with his late uncle Peter Ritara and that when his late father attempted to sell the land, the plaintiff was allowed to utilize the land since he had offered to refund the intended buyer his monies. He maintained that he was the sole surviving heir to the land.
20. Further, DW 1 admitted under oath that the grant was in existence though allegedly illegally obtained since it offends Section 91 (4) of the [Land Registration Act](#) and Section 4 of the [Land Act 2012](#) and Section 7 of the [Limitations of Actions Act](#).
21. A copy of the search was produced as P Exh No 1. From the copy, it is indicated that LR No Nkuene/Nkumari/2361 was registered jointly for the late Peter Ritara and Muriira Mwenda following a subdivision of LR No 528 out of a mutation registered on August 2, 2005 which had been duly signed by the beneficiaries to the subdivisions. The mutation form was produced as D Exh No 3. This was done during the lifetime of late Peter Ritara since he passed on October 11, 2006.
22. The operative law at the time was Section 101 (1) (a) of the repealed Registered [Land Act](#) which required that a registration of two or more persons must indicate whether those persons were registered as joint or proprietors in common. Section 101 (1) (b) thereof required that if jointly registered, the share of each proprietor be clearly shown. Section 102 thereof explained the distinction between joint proprietorship and proprietorship in common. In a joint proprietorship, the law provided that none of the proprietors was entitled to any separate share in the property. Therefore, upon the death of one of joint proprietors his interest would vest in the surviving proprietor. Similarly, in a proprietorship in common, once one party died, his share was to be treated as part of his estate.
23. The evidence on record herein and which was produced by both the plaintiff and the defendant as alluded above is that the deceased and the defendant were joint proprietors. That evidence has not been challenged.
24. In [Mukazitoni Josephine v AG](#) (2015) the Court of Appeal was dealing with a situation where the registration did not indicate the respective shares. In [Kasera & another v Richard](#) (Civil Appeal) 52 of 2018) (2022) KECA, 1025 KLR (September 23, 2022) (Judgment) the court was dealing with a distinction of joint proprietorship and proprietorship in common and the implications of a sale of a jointly owned land without an appointed administrator to the estate of the one deceased proprietor. The registration was also unclear on the respective shares of each proprietor in accordance with Section 101 (b) of the repealed [Registered Land Act](#).
25. The court held that Section 91 (3) of the [Land Registration Act 2012](#) had retained the same principles as the [repealed Cap 300](#) and that by dint of Section 91 (4) (b) the interest thereof vested on the surviving tenant whereas under tenants in common Section 91 (5) thereof the deceased share formed part of his estate. The court further held that Section 91 (2) of the [Land Registration Act](#) has introduced a default principle that if the instrument of transfer on an interest of land to two or more persons does not specify the nature of the rights, there shall be a rebuttal presumption that they hold the interest as tenants in common in equal shares which if not rebutted, upon the death of the tenants in common, his share vests in his estate rather than in the surviving tenant.
26. The effective date of [Land Registration Act](#) was May 2, 2012. D Exh No 2 is dated August 25, 2005 in which LR No 528 was split into four portions namely 2358 and 2359 in favour of Wilfred Gituma M’Mutiga, 2360 for Zaverio Mutwiri Karimba and the suit land in favour of Peter Ritara and Muriira Mwenda indicated as minor. D Exh No (3) indicates that the land was jointly owned though there was a pending transfer dated September 10, 2018 for James Mwenda Mbaabu. D Exh No 1 is dated April



- 28, 2006 between the plaintiff and the defendant over the suit land. The defendant describes himself as a joint owner together with Peter Ritara. This was during the lifetime of the deceased. The deceased was never a party to the lease agreement. No reasons were given before this court why he was not made a party. The lease was for more than five years hence is registrable in law. The law is that it cannot be given a retroactive effect if it is likely to affect or interfere with any crystallized or vested legal rights. This was the position taken in *Samuel Kamau Macharia & another v KCB Bank Ltd* (2012) eKLR.
27. In this suit the copy of records indicates that the suit property was held in a joint proprietorship. The plaintiff has pleaded and submitted that he was entitled to half share since he has letters of grant, took care of the deceased during lifetime and soon thereafter his death, he solely met the funeral expenses.
28. Unfortunately, the plaintiff has failed to provide any evidence that the creation of the title was intended to be a proprietorship in common and not a joint proprietorship. The Land Registrar was not called as a witness. The consent to subdivide and transfer the land was also not availed before the court so as to lead credence to the plaintiff's claim that the land was not held under joint proprietorship but as a tenancy in common. The plaintiff was a party to the lease agreement which described the suit property as jointly owned. The plaintiff did not object to the official search which indicated the suit property as jointly owned. If at all the plaintiff knew the property as owned otherwise one would have expected an application for rectification of the register prior to the death of the registered owner in common shares. The individual shares must also have been defined in the register under the terms of the law then in operation.
29. Due to this my finding is that the property was jointly owned and therefore after October 11, 2006, it vested in the name of the defendant and not the estate of the deceased proprietor currently presented by the plaintiff as a legal administrator.
30. The next issue is whether the plaintiff has proved the ownership by virtue of adverse possession. Adverse possession is based on two key concepts dispossession of the true owner and or discontinuance of possession by the true owner. See *Gabriel Mbui v Mukindia Maranya* (1993) eKLR, *Mtana Lewa v Kabindi Ngala Mwangandi* (2016) eKLR, *Chevron Kenya Limited v Oshwal Services Station Ltd & 2 others* (2013) eKLR.
31. In a permissive entry, the court in *Public Trustee v Ndegwa Wanduru* (1984) eKLR, held there can be no adverse possession if there is a lease or licence unless it has expired. There must also be animus possidendi for a period of 12 years. The claimant must also show evidence of occupation and possession with the full knowledge of the true owner.
32. In this suit, the plaintiff acknowledged the existence of a lease agreement due to expire in 2026 as well as a notice to vacate produced as D Exh No 5. Therefore, the plaintiff cannot approbate and reprobate at the same time. His entry was permissive and is still running. The registered owner also asserted his rights by a letter dated November 21, 2018. The plaintiff by acknowledging the estate of the registered owner watered down his claim based on adverse possession.
33. My finding therefore is that he has failed to discharge the burden to found a claim on adverse possession especially before the expiry of the lease.
34. The upshot is the suit is dismissed with costs.
- Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 25<sup>TH</sup> DAY OF JANUARY, 2023**

**In presence of:**



**C/A: Kananu**

**No appearance**

**HON. C.K. NZILI**

**ELC JUDGE**

