



**Ndungu & 2 others (Suing as the Chairman, Secretary and Treasurer Representatives of Ambassador of Christ Church) v Kisorio (Environmental and Land Originating Summons E010 of 2022) [2023] KEELC 18992 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18992 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E010 OF 2022  
YM ANGIMA, J  
JULY 27, 2023**

**BETWEEN**

**JOHN MATHENGE NDUNGU ..... 1<sup>ST</sup> APPLICANT**

**JULIA WANJIRU KABUI ..... 2<sup>ND</sup> APPLICANT**

**MARGARET WAMUHU NGACAKU ..... 3<sup>RD</sup> APPLICANT**

**SUING AS THE CHAIRMAN, SECRETARY AND TREASURER  
REPRESENTATIVES OF AMBASSADOR OF CHRIST CHURCH**

**AND**

**JOSPHAT KIPKEMBOI KISORIO ..... RESPONDENT**

**JUDGMENT**

**A. Applicants' Claim**

1. By an originating summons dated 16.02.2022 grounded upon Order 37 rule 7 of the [Civil Procedure Rules](#), 2010 and Section 38 of the Limitation of Actions Act (Cap.22) (LAA), the Applicants sought of the following reliefs, that is:
  - a. A declaration that the Applicants are entitled to be registered as the proprietors of a portion of  $\frac{1}{4}$  acre of land to be excised from L.R.NO: Laikipia/marmanet/5686 by virtue of the doctrine of adverse possession.
  - b. An order to issue compelling the Respondent to execute all the necessary documents to vest ownership of the said  $\frac{1}{4}$  acre of land out of L.R\_NO: Laikipia/marmanet/5686 to the Applicants and in default, the Deputy Registrar of the Honorable Court be authorized to do so on his behalf.



- c. That the County Surveyor and Land Registrar to dispense with the production of the original title deed for L.R. NO: Laikipia/marmanet/5686 while subdividing and transferring the ½ acre of land to the Applicants.
  - d. The Respondent to bear the costs of the suit.
2. The said summons was supported by an affidavit sworn by the 1<sup>st</sup> Applicants on 16.02.2022 as chairman of the church and the exhibits hereto. The Applicants pleaded that they had been in open, continuous, exclusive and uninterrupted possession and occupation of a portion of ¼ acre out of the suit property which was registered in the name of the Respondent for a period exceeding 12 years prior to the filing of the suit. It was their case that they had been in such exclusive possession for over 17 years without any interference from the Respondent or any person claiming under him. They asserted that they had fenced and developed the said portion of land and over the years used it for church services and as such they had acquired adverse possession thereof through the doctrine of adverse possession.
3. The Applicants further pleaded that they obtained possession of the land on account of purchase from an agent of the Respondent's deceased father in 2005 but the sale agreement subsequently became void for want of consent of the Land Control Board (LCB) under the Land Control Act (Cap. 302). They consequently sought the various reliefs in the summons.

#### **B. Respondent's Response**

4. The material on record shows that the Respondent did not enter appearance to the originating summons and did not file an answer thereto despite service. There is evidence on record to demonstrate that the Respondent was duly served with the summons.

#### **C. Applicants' Evidence at the Trial**

5. At the trial hereof, the 1<sup>st</sup> Applicant testified on behalf of the church as the sole witness. He adopted the contents of his affidavit sworn on 16.02.2022 in support of the originating summons as his evidence in-chief. He also produced the 6 annexures to the affidavit as exhibits and urged the court to allow their claim for adverse possession.

#### **D. Issues for Determination**

6. The court has considered the Applicants' originating summons dated 16.02.2022 together with supporting affidavit and exhibits thereto. The court is of the opinion that the key questions for determination in the suit are the following:
  - a. Whether the Applicants have proved their claim for adverse possession.
  - b. Whether the Applicants are entitled to the reliefs sought in the suit.
  - c. Who shall bear costs of the suit.



## E. Analysis and Determination

### a. Whether the Applicants have proved their claim for adverse possession

7. The court has considered the material and submissions on record on this issue. The elements of adverse possession were summarized in the case of *Kasuve -vs- Mwaani Investments Ltd & 4 Others* [2004] 1KLR 184 as follows:

“....and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, *Wanja vs Sakwa No.2* [1984] KLR 284. A title by adverse possession can be acquired under the [Limitation of Actions Act](#) for part of the land....”

8. Similarly, in the case of [Chevron \(K\) Limited -vs- Harrison Charo Wa Shutu](#) [2016] eKLR it was held, inter alia, that:

“At the expiration of the twelve-year period the proprietor’s title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College* (1900)1 Ch.19, 21.”

9. The court has considered the Applicants’ evidence on their claim for adverse possession. Although their initial entry was with the permission of the owner pursuant to a sale agreement the consent stood terminated by operation of law upon expiry of 6 months from the date of the agreement for want of the consent of the LCB consent in terms of Section 6 of the [Land Control Act](#). See - *Situma -vs- Cherongo* [2007] KLR 84.

10. It is evident that the Applicants’ evidence on the elements of adverse possession was not challenged at the trial since the Respondent did not attend the trial to question its credibility. It is further evident that the Applicants’ evidence was not controverted since the Respondent did not attend court to offer contrary evidence. In the premises, the court is inclined to accept the Applicants’ evidence on their claim for adverse possession.

11. The court accepts that they have been in open, continuous and exclusive possession of the portion of ½ acre out of the suit property for a period exceeding 12 years from the date the relevant sale agreement became null and void. The court also accepts that their possession was adverse since they fenced and developed that portion of land and continued utilizing it for church business.

12. There is no evidence on record to demonstrate that their possession has ever been interrupted in the legal sense. There was no evidence to show either that the registered owner had made a peaceful and effective entry into the land or that he had instituted legal proceedings for recovery thereof. What appears on record is a demand letter by the Respondent’s advocates which is not sufficient to interrupt



the Applicants' possession in the legal sense. (See *Ndeete -vs- Githu* [1984] KLR 776). The court is thus satisfied that the Applicants have proved their claim for adverse possession to the required standard.

**b. Whether the Applicants are entitled to the reliefs sought in the suit**

13. The court has already found and held that the Applicants have proved their claim for adverse possession of the portion of ¼ acre they are seeking from the suit property. It would therefore follow that they are entitled to the reliefs sought for the purpose of facilitating their registration as the proprietors of that portion of land. The court is thus inclined to grant the Applicants all the necessary reliefs to facilitate their registration as proprietor under Section 38 of the LAA.

**c. Who shall bear costs of the suit**

14. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. It is evident from the material on record that the suit was not defended since the Respondent neither entered appearance nor filed an answer to the originating summons. In the premises, the court is of the opinion that the appropriate order to make is that there shall be no order as to costs.

**F. Conclusion and Disposal orders**

15. The upshot of the foregoing is that the court finds and holds that the Applicants have proved their claim for adverse possession to the portion of ¼ acre out of the suit property. Consequently, the court makes the following orders for disposal of the originating summons:
- a. A declaration be and is hereby made that the Applicants have become entitled to be registered as proprietors of a portion of ¼ acre in their possession to be excised from Title No. Laikipia/Marmanet/5686 on account of the doctrine of adverse possession under Section 38 of the *Limitation of Actions Act* (Cap. 22).
  - b. An order be and is hereby made directing the Respondent to execute all necessary forms, documents and instruments to facilitate the transfer of the said portion of ¼ acre out of Title No. Laikipia/Marmanet/5686 to the Applicants within 30 days from the date hereof in default of which the Deputy Registrar of the court is hereby authorized to do so on his behalf.
  - c. The County Land Surveyor and the County Land Registrar – Laikipia shall dispense with the production of the original title deed for the suit property, the Respondent's national identity card, PIN Certificate, passport size photos and all documents in the possession, control or custody of the Respondent for the purpose of subdividing and transferring the portion of ¼ acre to the Applicants.
  - d. There shall be no order as to costs.

16 It is so decided.

**JUDGMENT DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 27<sup>TH</sup> DAY OF JULY, 2023.**

In the presence of:

Mr. Waichungo for the Applicants

N/A for the Respondent



C/A - Carol

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**Y. M. ANGIMA**

**JUDGE**

