



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 455 OF 1998

PETER MIGOSI MIGOSI.....PLAINTIFF

VERSUS

DIOCESE OF KISII.....DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendant on 29th December 1998 by way of a plaint dated 23rd December 1998 which was amended on 12th February 2001. The suit was brought by the plaintiff in his capacity as the legal representative of one, **Boyani Migosi**, deceased (hereinafter referred to only as “**the deceased**”). In his amended plaint, the plaintiff averred that by virtue of his position as the legal representative of the deceased, he has been registered as the proprietor of all that parcel of land known as **LR No. West Mugirango/Bomanono/1083** (hereinafter referred to as “**the suit property**”) to hold in trust for himself and other dependants of the deceased.

2. The plaintiff averred that on or about the month of January, 1996, the defendant by its agents or servants wrongfully entered and occupied a portion of the suit property measuring a quarter (1/4) of an acre (hereafter referred to as “**the disputed portion of the suit property**”). The plaintiff averred that upon entry onto the disputed portion of the suit property, the defendant proceeded to erect a church building thereon thereby preventing the plaintiff from using the same. The plaintiff averred that as a consequence of the foregoing, he has suffered loss and damage. The plaintiff sought judgment against the defendant for; a permanent injunction to restrain the defendant from remaining on or continuing in occupation of the disputed portion of the suit property, an order for the eviction of the defendant from the said portion of the suit property and the demolition of the structures that the defendant has erected thereon. The plaintiff also sought general damages.

3. The defendant filed its statement of defence on 30th January 2002. The defendant averred that the residents of Nyaisa village including the deceased donated land voluntarily to the defendant for the establishment of a primary school and Catholic Church in the area. The defendant averred that the disputed portion of the suit property was donated by the deceased to the defendant towards that end. The defendant averred that it has already constructed a primary school and a church building on the said parcel of land that was donated to it by the residents of Nyaisa Village (hereinafter referred to only as “**donated land**” where the context so admits).

4. The defendant averred that the plaintiff’s complaint relates to the expansion of the church building which is being undertaken within the boundaries of the donated land. The defendant denied trespassing on the suit property and accused the plaintiff of coming to court with unclean hands after inordinate

delay. The defendant averred that the plaintiff had instituted a similar suit against it at the Resident Magistrate's court at Nyamira, namely, **Nyamira SRMCC No. 13 of 1996** which suit it claimed was still pending hearing and determination by the time this suit was instituted.

5. On 22nd April 2003 the defendant filed a separate suit against the plaintiff namely, **Kisii HCCC No. 66 of 2003 (O.S)** (hereinafter referred only as "**the Originating Summons**") seeking; a declaration that the plaintiff's right to recover the disputed portion of the suit property is barred under the Limitation of Actions Act, Cap 22 Laws of Kenya and that his title to the same is extinguished on the grounds that the defendant has openly, peacefully and continuously occupied the same for a period exceeding 12 years. The defendant sought further orders that the defendant be registered as the proprietor of the disputed portion of the suit property and an injunction to restrain the plaintiff from interfering with the defendant's peaceful possession of the said portion of land. The plaintiff filed a replying affidavit on 5th November 2013 denying the defendant's claim to the disputed portion of the suit property by adverse possession. The defendant's Originating Summons was consolidated with this suit on 13th May 2008.

6. When the consolidated suit came up for hearing, the plaintiff gave evidence but did not call any witness. The defendant on the other hand called two (2) witnesses. In his evidence, the plaintiff told the court that he is the administrator of the estate of the deceased; Boyani Migosi who was at all material times the registered proprietor of the suit property. He stated that, in January, 1996, the defendant entered on the disputed portion of the suit property which was hitherto unoccupied and started making preparations for the construction of a church building thereon. Upon entry on the suit property, the defendant cleared the site and started digging trenches for the said building's foundation. He asked the defendant's agents and employees who were on site to stop the said acts of trespass but they declined to do so. This is when he decided with his brothers who are the other heirs of the estate of the deceased to file a suit against the defendant at the Resident Magistrate's court at Nyamira, namely, **Nyamira SRMCC No. 13 of 1996** (hereinafter referred to only as "**the Nyamira suit**") to stop the said act of trespass.

7. Their application for a temporary injunction in the Nyamira suit was dismissed by that court. After the dismissal of the said application, he applied for a grant of letters of administration in respect of the estate of the deceased. Upon obtaining the said Grant of Letters of Administration, he withdrew the Nyamira suit and filed this suit. He denied that the deceased had donated a portion of the suit property to the defendant for the construction of Nyaisa Primary School and Nyaisa Catholic Church. He stated that the disputed portion of the suit property was not occupied until the year 1996 when the defendant entered thereon and started making preparations for putting up a church building thereon. He stated that the said portion of the suit property is their only access to the main road and that is why the deceased did not donate the same for the primary school project. He stated that the other reason why the deceased did not donate land for the establishment of the said primary school unlike the other area residents was that she was a widow. He stated that the suit property is registered in his name to hold in trust for the heirs of the deceased. He produced as exhibits, copies of, a Grant of Letters of Administration in respect of the estate of the deceased that was issued to him on 24th November 1998, a certificate of confirmation of the said Grant of Letters of administration, the order for the withdrawal of the Nyamira suit, a title deed for the suit property and a certificate of official search on the title of the suit property.

8. The defendant's first witness was Raphael Achira (DW1). He told the court that he is the chairman of Nyaisa Catholic Church. He denied that the new church building is being constructed on the plaintiff's parcel of land. He stated that the new church building is being constructed on the donated land. He stated that the said parcel of land was donated by about 26 residents and the plaintiff's mother, Boyani Migosi (the deceased) was among the donors. In cross-examination, he stated that Nyaisa residents had donated land to the church to put up a primary school and a church building. He stated further that the construction works that prompted this suit was being carried out on the donated land. DW1 produced as exhibit, copies of the proceedings in the Nyamira suit

9. The defendant's second witness was Francis Mogoki (DW2). DW2 told the court that the defendant did not trespass on the suit property. He corroborated the evidence of DW1 that the residents of Nyaisa village had donated land to the defendant in 1976. He stated that he was one of the land donors who included the plaintiff's mother ("the deceased"). He stated that the land was donated to the defendant to

put up a school. After the donation, part of the donated land was reserved for the school while the other portion was set aside for a church building. DW2 gave names of 23 people who he said had donated land to the defendant. He stated that the defendant's activities are restricted to the donated land. In cross-examination, he stated that out of the land that was donated to the defendant to put up a primary school, the school committee gave a portion thereof to the church. He stated that the defendant already has a church building on the donated land and that the building that the defendant intended to put up and which gave rise to these proceedings was a new church building which was being put up because the church building that was put up earlier had become inadequate for the church members.

10. After the close of the defendant's case, the advocates for the parties agreed to make closing submissions in writing. The plaintiff filed his submissions on 1st August 2014 while the defendant did so on 27th June 2014. I have considered the parties' respective cases as pleaded in this suit and in the Originating Summons. I have also considered the evidence adduced by each party and the written submissions filed by the parties' advocates. The parties did not agree on the issues for determination by the court. From my analysis of the pleadings and the evidence tendered, the issues that arise for determination in this consolidated suit are as follows:-

- i. Whether the defendant is a trespasser on the disputed portion of the suit property?
- ii. Whether the plaintiff is entitled to the reliefs sought against the defendant?
- iii. Whether the defendant has acquired title to the disputed portion of the suit property by adverse possession?
- iv. Whether the defendant is entitled to be registered as proprietor of the disputed portion of the suit property?
- v. Whether the plaintiff should be restrained from interfering with the defendant's possession of the disputed portion of suit property?

11. Issues No. I and II;

Trespass has been defined as consisting in any unjustifiable intrusion by one person upon the land in the possession of another. See, **Clerk & Lindsell on Torts, 18th Edition, at page 923 paragraph 18-01**. It is not in dispute that the deceased was at all material times the registered owner of the suit property and as such was entitled to possession, use and enjoyment thereof. It is also not in dispute that the plaintiff is the administrator of the estate of the deceased and in that capacity he is entitled to enjoy the same rights that the deceased had on the suit property including that of possession. The plaintiff has contended that the defendant through its agents, servants or employees, entered the suit property in the month of January, 1996 without the plaintiff's consent or any justifiable cause and occupied the disputed portion thereof on which it proceeded to erect a church building. If this contention by the plaintiff is true, then the defendant committed acts of trespass on the suit property.

12. The onus was upon the plaintiff to prove the said acts of trespass. As I have stated above, the fact that the plaintiff is the owner of the suit property is not disputed. There is also no dispute that the defendant entered the disputed portion of the suit property and started to put up a church building thereon. What is in dispute is whether the defendant's entry into the disputed portion of the suit property was lawful or justifiable. The plaintiff has submitted that the defendant could only enter the suit property with his prior consent. The plaintiff has submitted that since no such consent was granted, the defendant's entry on the disputed portion of the suit property amounted to trespass. The defendant on the other hand submitted that its entry on the disputed portion of the suit property was lawful in that the same was donated to it by the deceased for the purposes of putting up a primary school and a church building.

13. The following comes out clearly from the evidence on record. The suit property is situated at Nyaisa village in West Mugirango, within Nyamira County. Sometimes in 1976, the residents of Nyaisa village came together and agreed to donate land to the defendant for the construction of a primary school. The

donation was voluntary. After the land was donated to the defendant, the defendant and the area residents established Nyaisa Primary School on a portion thereof. In addition to the primary school, the defendant constructed a church building known as Nyaisa Catholic Church on the same parcel of land. The residents of Nyaisa village seems to have co-existed well with the primary school and Nyaisa Catholic Church until the year 1996 when the defendant decided to put up a new church building on what it has claimed to be part of the donated land. This is when the plaintiff and the other heirs of the deceased went to court contending that the area where the defendant was putting up the new church building belonged to the deceased and was not part of the donated land as the deceased did not donate land for the establishment of the primary school as contended by the defendant.

14. It is not in dispute that the area where the defendant intends to put up the new church building falls within the suit property. The defendant has maintained that that portion of the suit property is part of the donated land. The plaintiff has denied that contention. In his evidence, the plaintiff testified that he was born in the year 1970 and as such he was only 6 years old in the year 1976 when Nyaisa residents donated land to the defendant for the establishment of Nyaisa Primary School. The plaintiff could not therefore state of his personal knowledge that the deceased did not donate the disputed portion of the suit property to the defendant. The plaintiff's evidence as to the reasons why the deceased did not donate land to the defendant is in my view hearsay. The plaintiff did not tender any direct evidence on this issue. From the material on record, I have noted that the plaintiff has siblings. It is not clear whether the plaintiff is the oldest. I am of the view that if any of the plaintiff's siblings had become of age at the time Nyaisa residents donated land to the defendant; he/she would have been in a better position to say whether indeed the deceased donated land to the defendant. I have also noted that most of the residents who donated land are related to the plaintiff. The plaintiff has referred to them in his affidavit in reply to the Originating Summons as **"members of our extended family"**. It is not clear to me why the plaintiff did not call any of these donors who he referred to by name in his affidavit as witnesses since they had personal knowledge of what happened in the year 1976 when the area residents donated land to the defendant for the establishment of Nyaisa Primary School.

15. The only inference the court can draw from the plaintiff's failure to call these witnesses is that their evidence would have been adverse to the plaintiff. This conclusion is supported by the proceedings in the Nyamira suit. Nyamira suit was filed by the plaintiff herein and his four (4) brothers as plaintiffs. One of the plaintiff's brothers, James Obino Migosi is recorded to have told the court at Nyamira that:

"In the land herein (sic) parcel No. West Mugirango/Bomanono/1083 is in the name of Boyani Migosi, now deceased, who is my mother. When alive, she and my uncle had donated about ½ acre to Nyaisa Primary School in 1976."

16. The plaintiff's said brother admitted that the deceased had donated land to Nyaisa Primary School contrary to the position adopted by the plaintiff herein. DW1 was the chairman of Nyaisa Catholic Church when the residents donated land for the establishment of Nyaisa Primary School while DW2 was one of the land donors. They told the court that the deceased was one of the residents who donated land to Nyaisa Primary School. DW2 gave the names of the residents who donated land. DW1 and DW2 struck me as honest and truthful witnesses. I was particularly impressed by DW2's testimony. DW2 is advanced in age. When he gave evidence, he could still recall very clearly the events that occurred over 38 years ago. DW1 and DW2 stood firm in cross-examination and their evidence was not shaken or challenged in any material respect on this issue as to whether or not the deceased donated land for the establishment of Nyaisa Primary School.

17. I am persuaded by the evidence before me that the deceased donated land to the defendant for the establishment of Nyaisa Primary School a portion of which is said to have been given by the school to the defendant to put up a church building. According to uncontested evidence on record, the defendant is the sponsor of Nyaisa Primary School. When land was donated by the residents of Nyaisa village to the defendant for the establishment of the said primary school, the defendant constructed Nyaisa Catholic Church on a portion thereof. It is not contested that Nyaisa Catholic Church and Nyaisa Primary School are standing on the donated land. The plaintiff has no problem with the existing church building. His problem according to the evidence on record is with the new church building which the defendant had

started to put up on the disputed portion of the suit property in the year 1996.

18. The defendant has contended that it was allowed by Nyaisa Primary School to put up the new church building on the donated land. The question that I need to answer at this stage is whether the defendant's new church building is being put up on the land that was donated by the deceased to the defendant for the establishment of Nyaisa Primary School. If the answer to that question is in the affirmative then the defendant cannot be a trespasser on the disputed portion of the suit property. There is no evidence that the disputed portion of the suit property was donated by the deceased conditionally. It follows that in donating the disputed portion of the suit property to Nyaisa Primary School, the deceased had given the said school unconditional right to occupy and use the same for its purposes. Since the disputed portion of the suit property was in the possession of the said primary school, the defendant did not require any other consent a part from that of the said primary school to enter the same.

19. According to the report that was prepared by the District Surveyor, Nyamira District on 13th May 1996 that was produced in the Nyamira suit, the portion of the suit property that was donated by the deceased to Nyaisa Primary School measured 0.2154 hectares which is equivalent to 0.532 acres. This seems to be in accord with the measurement of ½ acre which the plaintiff's brother told Nyamira court to have been donated to Nyaisa Primary school by the deceased. The plaintiff had challenged this report in his evidence. He had contended that no one from his family was involved in the preparation of the report and that additional paragraph was inserted in the report in a clandestine manner. I have looked at the proceedings of Nyamira suit. I have noted that the said report was made pursuant to a court order that was made in the presence of both parties and the parties were expressly directed to meet the District Surveyor on a particular date for the preparation of the said report. The report on its face states that the surveyor visited the disputed portion of the suit property in the presence of the plaintiffs and the defendants in the Nyamira suit.

20. I have noted further that, the said report was filed in court in its amended form and the parties were given an opportunity to object to the same and no objection was raised by either party. The report was thereafter adopted by the court and formed the basis of the said court's ruling of 18th July 1996 in which the court essentially determined the entire suit that was brought by the plaintiffs at the Resident Magistrate's Court at Nyamira (the Nyamira Suit).

21. According to the said report by Nyamira District Surveyor, the defendant's new church building is being put on a portion of land that Nyaisa Primary School had given to the defendant from the donated land. There is no evidence before me that the portion of the suit property on which the new church building is being put up by the defendant exceeds 0.2154 ha. that was donated to Nyaisa Primary School by the deceased. In the absence of any evidence to the contrary, it is my finding that the defendant's new church building is being put up on the donated land and that the portion of the said building that is on the suit property lies on that portion of the suit property that the deceased had donated to the said primary school. Since the defendant is putting up the new church building with the permission of Nyaisa Primary School to which the deceased had donated the disputed portion of the suit property, the defendant's entry on the said portion of the suit property is in my view justified. The construction works being undertaken by the defendant on the disputed portion of the suit property do not therefore constitute acts of trespass.

22. A part from his complaint regarding the construction of the new church building, the plaintiff had also complained about interference by the defendant with his road of access through the disputed portion of the suit property to the main road in the area. The plaintiff led evidence that the new church building is being put up on a portion of the suit property which is his only access to the main road and if allowed to continue, the plaintiff and other heirs of the deceased would be left with no access to the said road. This contention was not denied by the defendant. I do not think that it would have been the intention of the deceased to donate her only access to the main road to the Nyaisa Primary School. The plaintiff testified that the deceased had complained to the school on a number of occasions regarding the said access to the main road. The plaintiff also testified that they had been using the disputed portion of the suit property to access the said main road until the year 1996 when the defendant cleared the area and commenced the construction of the new church building.

23. I am of the opinion that although the defendant has a right to use the disputed portion of the suit property having obtained consent from Nyaisa Primary School to do so, it has no right to block the deceased's heirs only access to the main road from the suit property. The plaintiff has a right to use the access through the disputed portion of the suit property that they have used over the years to the said main road. The fact that they have used the said access over the years is evidence of the fact that the access was not donated to the school by the deceased. Any interference with the said road of access is therefore an act of trespass and the plaintiff is entitled to an appropriate relief to arrest the same. Save as stated, it is my finding that the other reliefs sought by the plaintiff against the defendant in the amended plaint cannot be granted. As I have stated above, the defendant's occupation of the disputed portion of the suit property is justified. There is no basis therefore upon which an order for the eviction of the defendant from the suit property can issue. The same applies to the prayer for a permanent injunction and damages that was not proved in any event.

24. Issue Nos. III and IV;

In the case of **Wanje –vs- Saikwa (No. 2) [1984] KLR 284**, it was held that;

- a. In order to acquire by the statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it.
- b. What constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.
- c. A person who occupies another person's land with that person's consent cannot be said to be in adverse possession as in reality, he has not dispossessed the owner of the land and the possession is not illegal.

25. In the case of **Salim –vs- Boyd & Another [1971] E. A. 550**, it was held that for a claimant of land by adverse possession to succeed he must prove that he has been in open, continuous and uninterrupted occupation of the subject land for a period of 12 years or more. According to the evidence on record, the disputed portion of the suit property was donated to the defendant by the deceased for the establishment of Nyaisa Primary School which is a public school. The land was essentially donated to the school and the defendant's activities thereon including the construction of the new church building have been carried out with the consent of the school.

26. In the Nyamira case, the defendant's representative had told the court that **“It is true that late Boyani gave a portion of land to Nyaisa Primary School.....The school is sponsored by the Catholic Church. The school gave a portion of its donated land to the church to build a church house.”** Nyaisa Primary School from whom the defendant has derived a right to occupy the disputed portion of the suit property has occupied the said portion of the suit property over the years with the consent of the deceased who had donated the same. The defendant who has occupied the disputed portion of the suit property with the consent of Nyaisa Primary School cannot say that its occupation has been adverse to the deceased. The defendant did not also place any evidence before the court in proof of the fact that it has been in occupation of the disputed portion of the suit property that it seeks to acquire by adverse possession. As stated above, the disputed portion of the suit property was donated to the primary school. It is the said school that has been in occupation of the whole of the donated land. From the evidence on record, the defendant entered the disputed portion of the suit property in 1996 when it was permitted by Nyaisa Primary School to construct a new church building thereon. It was not in occupation of the disputed portion of the suit property prior to that date. The defendant could not have acquired prescriptive rights over the said portion of the suit property between the year 1996 when it is said to have entered the suit property and the year 2003 when it filed the Originating Summons claiming the same by adverse possession.

27. It follows from the foregoing that by the time the defendant filed the Originating Summons seeking a declaration that it had acquired title to the disputed portion of the suit property by adverse possession; the

defendant had not been in adverse possession of the disputed portion of the suit property for the statutory period of 12 years. I am fully in agreement with the submissions by the plaintiff's advocates that the defendant's plea to be registered as proprietor of the disputed portion of the suit property by adverse possession cannot succeed.

28. Issue No. V;

A part from its claim to be registered as proprietor of the suit property by adverse possession, the defendant had also sought an injunction to restrain the plaintiff from interfering with its occupation of the said portion of the suit property. As I have held above, the defendant's new church building is being put up on the disputed portion of the suit property with the consent of Nyaisa Primary School to which it had been donated by the deceased. I am of the view that the plaintiff has no right to interfere with the activities being carried out by the defendant on the disputed portion of the suit property. Nyaisa Primary School has a right to use a portion of the land that was donated to it by the deceased to host a church building. The plaintiff has no right to interfere with the activities being carried out on the disputed portion of the suit property with the consent of the said primary school. The defendant is therefore entitled to the protection of whatever undertaking it is engaged in on the disputed portion of the suit property with the consent of the said school. Consequently, it is my finding that the defendant has made out a case for an injunction to restrain the plaintiff from interfering with its activities on the disputed portion of the suit property save as otherwise stated herein.

29. Conclusion;

In conclusion, it is my finding that although the plaintiff is the registered proprietor of the disputed portion of the suit property, the same was donated by the deceased who was the plaintiff's predecessor in title to Nyaisa Primary School. The defendant's activities on the disputed portion of the suit property are being carried out with the consent of the said primary school. The defendant did not require the consent of the plaintiff to enter the suit property because the plaintiff was not in possession of the same. The defendant is therefore not a trespasser on the disputed portion of suit property. Due to the foregoing, I am not satisfied that the plaintiff has established a case for the eviction of the defendant from the disputed portion of the suit property.

30. From the evidence on record, I am satisfied that although the deceased had donated the disputed portion of the suit property to Nyaisa Primary School, she continued to use a portion thereof to access the main road in the area. The donation of the said portion of the suit property did not therefore take away the deceased's and the plaintiff's right of way through the said portion of the suit property. The plaintiff has in the circumstances made out a case for an injunction to issue restraining the defendant from blocking his access through the disputed portion of the suit property to the main road. The plaintiff's suit therefore succeeds in part.

31. As concerns the Originating Summons, the defendant has failed to prove his claim over the suit property by adverse possession. The defendant has however proved that it has an interest in the disputed portion of the suit property that it has acquired from Nyaisa Primary School which deserves protection by the court. In the circumstances, the Originating Summons also succeeds in part.

32. I therefore enter judgment on the following terms in this suit and in the Originating Summons:-

i. An injunction is hereby issued in favour of the plaintiff restraining the defendant from interfering with the plaintiff's right of way through the disputed portion of LR No. West Mugirango/Bomanono/1083 to the main road in the area.

ii. Provided that reasonable road of access is provided by the defendant to the plaintiff through the disputed portion of LR No. West Mugirango/Bomanono/1083 to the main road; an injunction is hereby issued in favour of the defendant restraining the plaintiff from interfering with the defendant's activities on the said portion of the disputed property.

iii. Each party shall bear its own cost of this suit and the Originating Summons.

Delivered, signed and dated at KISII this 13th day of March, 2015.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the plaintiff

Mr. Ochwang'i h/b for Bunde for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE