



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

CIVIL CASE NO. 41 OF 2011.

IN THE MATTER OF THE LIMITATIONS OF ACTIONS ACT CAP.22 LAWS OF KENYA

AND

IN THE MATTER OF THE REGISTERED LAND ACT CAP. 300 LAWS OF KENYA

AND IN THE MATTER OF LAND KNOWN AS S.TESO/AN'OROMO/912 MEASURING 0.16

BETWEEN

1. JAPHETH BARUA KIRORI

]

**2. HOLLY REDEEMED APOSTOLI MINISTRIES INTERNATIONAL].....
APPLICANTSMINISTRIES**

=VERSUS=

1. JONATHAN WABALA

]

**2. NEW SPRING OF LIFE GOSPEL MINISTRIES BUSIA(K)
.....RESPONDENTS.**

J U D G M E N T.

The originating summons dated 21st April, 2011 was filed by the 1st Applicant in person, on behalf of himself and that of the 2nd Applicant. He prays for the following determinations;

1. Whether the Respondents registration with the parcel South Teso/Angoromo/912 as proprietors should be cancelled.
2. Whether Applicants have been in adverse possession of the said land for 12 years and more.

The application is opposed by the Respondents through the replying affidavit filed by the 1st Respondent on behalf of himself and the 2nd Respondent sworn on 6th February, 2013. Mr. Elung'ata and Mr. Omondi Advocates appeared for the Applicants and Respondents respectively. During the hearing, the 1st Applicant testified for the Applicants as PW 1 while the 1st Respondent testified for the defence as DW .1

The Applicants case is as summarized hereinbelow;

1. That the 1st Applicant is the secretary to the 2nd Applicant which is a registered religious society. That in 1996, the Applicants were allowed to operate a church service on land parcel No. South Teso/Angoromo/912 by the 1st Respondent after he became a member of the church (2nd Applicant).
2. That in the year 1999, 1st Applicant started noticing some change on the conduct of the 1st Respondent who was the administrator of the church. In the year 2011, the 1st Applicant learnt that the 1st Respondent had transferred the land to the name of the 2nd Respondent and he filed this suit.
3. That the 2nd Respondent, though registered as the owner of the land in question, is not using the said land.

The evidence in support of the defence is summarized as shown hereinbelow;-

1. That the 1st Respondent got to know the Applicants in 1996 when he got saved and joined the church (2nd Applicant). With the consent of his family members, he allowed the 2nd Applicant to start use land parcel South Teso/Angoromo/912 as a place of worship.
2. In January, 2011, the 1st Respondent left the Applicants church and founded the 2nd Respondent. The Applicants however continued using the land in question with his permission even though he had in January, 2011 asked the Applicants to stop conducting church services on the said land.

The Applicants' counsel filed written submissions dated 8th August, 2013 on the 12th August, 2013 while the Respondent's counsel filed theirs dated 3rd September, 2013 on 5th September, 2013. The court has carefully considered the evidence adduced by both PW 1 and DW 1 and submissions by both counsel and has come to the following findings;-

1. That both the 2nd Applicant and 2nd Respondent are religious societies which are duly registered.
2. That the 1st Applicant is an official and founder member of the 2nd Applicant, while the 1st Respondent is an official and founder member of the 2nd Respondent.
3. That before the 1st Respondent founded the 2nd Respondent, he was a member of the 2nd Applicant having joined that church in 1996. After joining the 2nd Applicant's church in 1996, he allowed its officials to start operating church services from land parcel South Teso/Angoromo/912. The church was still operating from the same piece of land when this case was being heard in court.
4. That the 1st Respondent terminated his permission for the 2nd Applicant to operate from the said land in January, 2011. A person occupying land with the permission or consent of the registered owner cannot claim to be in adverse possession, as such person is a licensee. The Applicants cannot therefore claim to have been in adverse possession of the said land before the year 2011 when the permission to use the land was withdrawn. Time started to run in favour of the Applicants for purposes of adverse possession in the year 2011 when the 1st Respondent indicated his unwillingness to allow their continued occupation. From January, 2011 to the date this suit was filed only a few months had lapsed.
5. That had the Applicants taken possession of the said land in 1996 without authority of the registered owner, then time for purposes of adverse possession, would have started running from that time irrespective of whether ownership of the land changed hands, so long as the possession was continuous. This position was restated in the case of **Githu -vs- Ndeete** C.A.C.A. No. 4 of 1979 where Potter J.A. held.

“ the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession.”

6. That even after the Applicants started operating church services on the land in question with the permission of the 1st Respondent, the latter did not lose possession of the said land. In the case of **Wambugu –vs Njuguna [1983] KLR 173**, the court held as follows;

“ In order to acquire by statute of limitation title to land which has a known owner, the owner must have lost his right to the land by being dispossessed of it or having discontinued his possession of it. Dispossession of the proprietor that defeats his action are acts which are had been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved he has been in possession for the requisite number of years.”

This position of the law was affirmed by the Court of Appeal in the case of **Kim Pavey & 2 others –vs- Loise Wambui Njoroge & another [2011] eKLR**.

As possession is a matter of fact, the court finds the Applicants have not adduced any evidence to show that the Respondents were dispossessed of the land or that their possession of the land was discontinued for a continuous period of 12 years before the filing of this case. From the foregoing therefore, the court finds that the Applicants have failed to prove their case on adverse possession against the Respondents to the standard required. The Applicants case is therefore dismissed with costs.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON...16THDAY OF OCTOBER,2013.