

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 37 of 1994 (O.S.)

JOSEPH WAMBUGU RUGU PLAINTIFF

VERSUS

DIOCESE OF NYERI TRUSTEES DEFENDANT

JUDGMENT

The plaintiff's claim is that he has acquired title by adverse possession to a portion of 2 acres on parcel No. LR 1105/5 situated within Nyeri district. In his affidavit in support of the originating summons the plaintiff deponed that he had been in continuous uninterrupted occupation and possession of the portion measuring approximately 2 acres for over 30 years. That possession he deponed was adverse to the title of the defendant. When the case came up for hearing by way of oral evidence the plaintiff gave evidence in support of this case. He said that he was claiming the 2 acres out of Nyeri Hill Farm. He produced an abstract of title in respect of LR No. 1105/5. He said he had lived on that land from June 1953. That he only vacated the land in January 1994 after his house was demolished by the director of the Nyeri Hill Farm. His parents had moved on that land as squatters and he was born on that farm. Later in his evidence the plaintiff stated that he was born in 1938. During his occupation of the 2 acres he said that he had planted banana, sugar cane and other crops which he used to feed his children. He was cross examined by counsel for the defendant and in his response he confirmed that he had worked for the defendant amongst other people. That they the workers had constructed a village for workers. He said that when he went to the farm in 1953 during the Mau Mau emergency when they sought refuge in a farm. He confirmed that the defendant had sold to those who were in occupation of that land portions of land on the west side of that farm. He bought his portion for Kshs.650/-. He was allocated plot No. 264. His mother also purchased a plot namely plot No. 84. He denied that those plots were given by the defendant as an alternative to their occupation of the Hill Farm. On being questioned on the extent of his occupation on the Hill Farm he said that it was about 2 acres that he was cultivating. He then said that he would leave to the court to decide where to curve out the 2 acres from that land. The defence evidence was given by Father Dr. Boniface Murage Ngunjiri. He is a Catholic priest in the diocese of Nyeri. He has been a priest for 40 years in that diocese. Much of the time when the happenings of this case were taking place he was in Rome. He confirmed that the Hill Farm had attracted some squatters and also workers who are residing on it. As a result the diocese decided to sell to those in occupation a portion of that farm at the cost of Kshs.650/-. This was to enable the occupants to leave the farm. The price for those plots he said were a token not the market value and it was to facilitate every one to move from the Hill Farm. That it was around 1976 that people in occupation of that farm were given alternative land. That was the evidence offered by the parties in this case. The defendant filed affidavits in this matter on the 23rd May 1994. Specifically, the affidavit of Fr. Augustine Mureithi Mbogo sworn on 20th May 1994, in paragraph 3 he deponed that the plaintiff was occupying the defendant's labour line on LR No. 1105/6 and not LR 1150/5 as claimed in this case. The defendant's affidavit did not get a response from the plaintiff in respect of the property the plaintiff was claiming to occupy. The question that arises is what was the correct property that the plaintiff seeks to be registered in his name? The property now claimed by the plaintiff where he says he has acquired by adverse possession 2 acres namely LR No. 1105/5 is 495 acres. The plaintiff claims 2 acres of that land. On being cross examined the plaintiff was unable to say where the 2 acres are in that vast property. The plaintiff did also admit in cross examination that he at one time worked for the defendant. Those two issues make it difficult for the court to determine the exact location of the 2 acres and the period in which the time began to run in respect of the claim for adverse

possession. This is because the plaintiff did not state when his employment with the defendant ceased. In the case of *Kasuve v Mwaani Investments Limited and others* [2004] 1 EA. The Court of Appeal held in part;-

“Further, the portions which the appellant was claiming were not clearly demarcated. There was no concrete evidence that the appellant was in exclusive adverse possession of any definite and distinct land ascertained to be 40 acres, hence the claim for adverse possession would fail through uncertainty.”

In that same case the Court of Appeal stated as follows:-

“In the circumstances, there was no concrete evidence that appellant was in exclusive adverse possession of any definite and distinct land ascertained to be 40 acres.”

The facts of this case are similar to that case which was in the Court of Appeal. In that case the plaintiff claimed adverse possession of 40 acres on a land that was measuring a total of 9,009 acres. The Court of Appeal’s comment in that case are very applicable to our case. The plaintiff in our case was unable to state with any clarity where the 2 acres that he was claiming on a land measuring 495 acres were. For that reason the plaintiff’s claim of adverse possession would fail. The defendant also faulted the plaintiff’s claim for having sued the wrong party. In the defendant’s submission the defendant submitted that the plaintiff ought to have sued the Registered Trustees of the defendant. That submission would be correct and if the defendant had led evidence to show that the Trust was not registered. Section 3(1) and (3) of the Trustees (Perpetual Succession) Act provides:-

“(1) Trustees who have been appointed by any body or association of person established for any religious, educational, literary, scientific, social, athletic or charitable purpose, or who have constituted themselves for any such purpose may apply to the Minister in the manner provided in this Act for a certificate of incorporation of the trustees as a corporate body.

.....(3) The trustees shall thereupon become a body corporate by the name described in the certificate, and shall have perpetual succession and a common seal, and power to sue and be sued in their corporate name and, subject to the conditions and directions contained in the certificate, to hold and acquire, any by instruments under the common seal to convey, transfer, assign, charge and demise any movable or immovable property or any interest therein now or hereafter belonging to, or held for the benefit of, the trust concerned in the same manner and subject to such restrictions and provisions as trustees might so do without incorporation.”

Subsection 3 provides that on registration the Trust can sue or be sued in the corporate name. On the whole the finding of this court is that the plaintiff has failed to prove on a balance of probability his claim of adverse possession over property LR No. 1105/5. The plaintiff’s claim is therefore dismissed with costs to the defendant.

Dated and delivered at Nyeri this 30th day of June 2008.

MARY KASANGO

JUDGE