

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 61 of 2004

PRESBYTERIAN FOUNDATION (P.C.E.A. NAKURU WEST).....
.....PLAINTIFF

VERSUS

KANJI VALJI.....1ST
DEFENDANT

HARJI VALJI.....2ND
DEFENDANT

JUDGMENT

The plaintiff, The Presbyterian Foundation (*P.C.E.A. Nakuru West*) filed an originating summons against the defendants, Kanji Valji and Harji Valji seeking to be declared to be entitled to title number **Nakuru Municipality/Block 3/366** (*original LR. No. 8836/761*) (*hereinafter referred to as the suit land*) by virtue of the plaintiff's adverse possession of the whole of the said parcel of land having occupied the same for a period of over twelve years exclusively, openly, quietly, continuously, peacefully and without the consent of the defendants, the registered owners. The plaintiff further prayed for an order of this court to order the Land Registrar Nakuru to register it as the owner of the suit land. The originating summons is supported by the annexed affidavit of Simon Nderitu Kanai, the Chairman of the Property Committee of Nakuru West Parish of the Presbyterian Church of East Africa. After filing the originating summons, the plaintiff was granted leave by this court to serve the defendants by substituted service in a national newspaper. The plaintiff complied with the order of this court and on the 15th of July 2004, published the notice in the East African Standard. This court was satisfied that the defendants were properly served and issued directions for the plaintiff to proceed with its suit against the defendants, their absence notwithstanding.

During the hearing of the case, the plaintiff called two witnesses. PW2 Wilson Wahome Kiboi testified that he was the secretary of the Presbyterian Foundation. He explained to the court that the foundation was a company limited by guarantee which was incorporated by the Presbyterian Church of East Africa to hold the properties of the church. He told the court that all the church premises and other properties of the Presbyterian church were owned by the Presbyterian Foundation on behalf of the members of the various congregations. He testified that once the local parish or the local church had acquired a property, the said congregation was required to register the property in the name of the Presbyterian Foundation and hand over the title documents to him as a secretary of the foundation for safe keeping. He told the court that the properties once registered, were managed by the local churches without interference by the management of the Presbyterian Foundation.

PW1 Simon Nderitu Kanai testified that sometimes in 1981, the former president Daniel Arap Moi visited their church at Nakuru West. He saw that the said church lacked space to expand and directed that the adjoining parcels of land be transferred to the church. The owners thereof were to be compensated by being allocated alternative parcels of land or in cash if they so wished. He testified that after the issuance of the Presidential directive, the church met with the defendants and entered into an agreement whereby the church agreed to compensate the defendants for the developments that had been undertaken on the suit land (*agreement produced as plaintiff's exhibit No. 4*). He told the court that the church paid the defendants the sum of Kshs 310,000/= in two instalments in September 1985 (*receipts produced as*

plaintiff's exhibit No. 5). He further told the court that the Nakuru Municipal Council, further to the presidential directive allocated the defendants an alternative parcel of land (*letters from the Municipal council of Nakuru confirming the allocation were produced as plaintiff's exhibit no. 3, 6 & 7*).

He testified that after the defendants had been paid for the developments on the said parcel of land by the church and allocated an alternative parcel of land by the government, the church took possession of the suit land. He testified that since then i.e. 1985, the plaintiff has been in peaceful occupation of the suit land without let or hindrance by the defendants. He told the court that after the conclusion of the said transaction, the defendants failed to transfer the said parcel of land to the plaintiff in spite of the plaintiff making several requests to the defendants to do so. He testified that all their efforts to have the defendants execute the transfer documents so that the suit land could be registered in the name of the church was futile. PW1 produced an abstract of the land register in respect of the suit land as *plaintiff's exhibit No. 2* which shows that the defendants were registered as the owners of the said parcel of land on the 15th of April 1982. PW1 urged this court to allow the plaintiff's suit as prayed to enable the church to be registered as the owner of the suit land.

I have read the originating motion filed by the plaintiff in this case. I have also carefully considered the evidence that was adduced by the plaintiff in support of its case. The plaintiff is claiming to have acquired title of the suit parcel of land by operation of the law. It claims that it should be declared to have acquired the title in respect of the suit land by adverse possession. The law to be considered by this court in determining whether or not the plaintiff had acquired title to the suit land by adverse possession is settled. In **Wambugu –vs- Njuguna [1983]KLR 172**, the Court of Appeal held that in order for a person to acquire title by the operation of the statute of limitation to land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The plaintiff is required to prove that he had dispossessed the defendants of the suit land or that the defendants had discontinued possession of the suit land for a continuous period of twelve years so as to entitle the plaintiff to the title to the suit land by adverse possession.

The Court of Appeal in **Francis Gicharu Kariri –vs- Peter Njoroje Mairu CA Civil Appeal No. 293 of 2002 (Nairobi) (unreported)** approved the decision of the High court in the case of **Kimani Ruchire –vs- Swift Rutherford & Co. Ltd [1980] KLR 10** at page 16 letter B, where Kneller J. held that:

“The plaintiffs have to prove that they have used this land which they claim as of right. Nec vi, Nec clam, Nec precario (no force, no secrecy, no persuasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it or by way of recurrent consideration.”

In this case the plaintiff has established that it took possession of the suit land in 1985 after the defendants had been paid compensation for the developments that they had undertaken on the suit land and after the government had allocated them an alternative parcel of land. The plaintiff has further established that it has been in continuous occupation of the suit land from 1985 without let or hindrance by the defendants. It has further established that it had by its action of taking possession of the suit land dispossessed the defendants of the same and having occupied the said parcel of land for a period of over twelve years, it had acquired the title of the said parcel of land by adverse possession. The plaintiff's occupation and possession of the said parcel of land has been exclusive, open, quiet, continuous, peaceful and uninterrupted since 1985. There is no evidence that the defendants made any effort to assert their proprietary right over the said parcel of land.

Having carefully evaluated the evidence adduced in this case, I do hold that the plaintiff has established that it has acquired title in respect of the suit land by adverse possession. I will therefore enter judgment for the plaintiff against the defendants jointly and severally as prayed in their originating motion. I therefore make the following orders:

(i) The plaintiff is declared to be entitled to all that parcel of land known as Nakuru Municipality/Block 3/366 (*original LR. No. 8836/791*) measuring 0.0351 acres by virtue of having acquired the same by adverse possession.

(ii) The District Land Registrar Nakuru is hereby ordered to register the plaintiff as the owner of the suit land.

(iii) Since the defendants did not enter an appearance in this matter and since the plaintiff's case was heard in the absence of the defendants, I will make no orders as to costs.

DATED at NAKURU this 24th day of March 2006.

L. KIMARU

JUDGE