



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT MOMBASA

ELC NO. 500 OF 2011

REGISTERED TRUSTEES OF THE CATHOLIC

ARCHDIOCES OF MOMBASA.....PLAINTIFF

VERSUS

PRUDENCE WAKIO AND 101 OTHERS..... DEFENDANTS

JUDGEMENT

THE PLAINTIFF'S CASE

1. The Plaintiff filed this suit vide a plaint dated 26th August 2011 and filed on 12th September 2011. The plaintiff states that at all material times they have been the owner of the suit property known as Title No 15031/169 Taita District and has been lawfully and rightfully in possession. That the defendants and various other people without authority from the plaintiff have wrongfully entered and taken possession of the suit property and have thereafter wrongfully remained in possession thereof and have thereby trespassed and continue to trespass thereon and have erected semi-permanent and permanent structures on the suit property. That the defendants have further cut down trees, utilized water resources and grazed on the suit property without the plaintiff's consent leading to environmental degradation. The plaintiff further stated that the presence of the defendants on the suit property has denied the plaintiff's staff, nuns and priests from peaceful enjoyment of the land and prevented the plaintiff's development plans due to the constant threats from the defendants.

2. Further to that, the plaintiff aver that it has been deprived of the use, possession, occupation and quiet enjoyment of the suit property and prays for judgment against the defendants jointly and/or severally for:-

a) A declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that parcel of land known as L.R No 15031/169 Taita District ("suit property").

b) A declaration that the defendants whether by themselves or their servants or agents and/or otherwise howsoever are wrongfully in occupation of the suit property and are accordingly, trespassers on the same.

c) A declaration that the defendants whether by themselves or their servants or agents and/or otherwise however are not entitled to remain on the suit property.

d) An order that the defendants and all other trespassers do forthwith vacate and deliver vacant possession of the suit property to the plaintiff company.

e) An order of eviction against each of the defendants, their agents, servants, as well as any other parties whom the defendants or any of them have permitted to occupy any part of the suit property.

f) A permanent injunction restraining the defendants whether by themselves or their servants or agents and/or otherwise howsoever from remaining on or continuing in occupation of the suit property.

g) General damages for trespass.

h) Mesne profits for the wrongful occupation of the suit property as trespassers.

i) An order directed to the Provincial Police Officer Coast Province, the Officer Commanding Police Division, Taita taveta and all police stations in the vicinity of the suit property to execute the orders of this Honorable Court and evict all trespassers and unauthorized occupants of the suit property including the defendants and their servants and agents.

j) *Costs of this suit together with interest thereon at such rate and for such period of time as this Honorable Court may deem fit to grant.*

k) *Any such other or further relief as this Honorable Court may deem appropriate.*

3. The plaintiff filed a reply to defence and defence to counterclaim on 22nd August 2012 and denied that their suit is time barred since the plaintiff acquired title to the suit property when issued with a Certificate of Title No C.R 47503 on 19th March 2010. The plaintiff also denied the claims that the defendants made to the suit property as well as the allegations of fraud putting the defendants to strict proof thereof.

4. The plaintiff called Father David Mwakiwiwi Ndigho (PW1) who testified that he is a priest in the Catholic Archdiocese of Mombasa. He adopted his witness statement filed on 12th September 2011 as his evidence in-chief. He stated that the church was given land by Voi Development Co. Ltd and produced a letter dated 10th November 1995 in which Voi Development Co. Ltd donated 40 acres of land to the church. He also produced a transfer of L.R No 1503/169 which was done in favour of the plaintiff church. Consequently the plaintiff holds title to the suit property for 969 years from 1st August 1962 and he produced a copy of the certificate of lease as exhibit. He further testified that at the time of donation, the land was vacant with no encumbrances and the church had developmental plans and produced copies of the proposed subdivisions for several projects.

5. The witness also testified that the defendants invaded the land after the same had been donated to the church. That in quest of finding a solution, the church held its first meeting with the defendants on 13th March 2002 and he produced the minutes of that meeting. That the parties could not reach a settlement and held another meeting on 16th December 2008 with the defendants under their organization known as 'Kilio Cha Haki' at the Voi's D.O's office and produced the minutes of that meeting. That it was agreed that the church would donate 7 acres and incur the subdivision costs to settle the defendants. That after the process of subdivision was completed the defendants refused to move and insisted on remaining and even removed the beacons.

6. He stated that there was an additional meeting on 13th March 2009 at the D.O's office Voi where the witness was the chair, and attended by officials from Kilio Cha Haki, representatives of Town Clerk, Mayor and his deputy and the area chief. The witness also produced minutes of the meeting and pointed out that in Minute 4/13/09, the mayor stated that the land belonged to the Catholic Church and the defendants were intruders and their refusal to vacate hindered developmental plans. On top of this, the witness produced minutes of a further meeting that was held in the same location on 16th January 2009 which was attended by the church, the defendants and government officials and reiterated that the church was ready to give the defendants 7 acres but they refused. That the actions of the defendants have stopped the church from carrying any developments on the land like building a church, secondary school, adding that the only development on the land is a nursery and primary school and produced the plans for the proposed development.

7. With no solution in sight, the plaintiff's advocate wrote to the defendants a demand letter dated 16th April 2011, which the witness produced, that sought to demand the defendants to vacate the land and give vacant possession. The witness concluded by asking court to enter judgement in favour of the church, order the defendants to vacate and land returned back to the church.

8. On cross examination, he stated that as the parish priest he had the authority to take action on behalf of the church and that the Certificate of Title of L.R No 1503/169 that was issued on 19th March 2010 was a result of subdivision of the original Plot CR 9665. That the land was donated to the church in 1995 by Voi Development Co. Ltd when it was vacant, and that the defendants started living on the land after 1995 and they have built semi-permanent and permanent houses. The witness testified that he does not know how Voi Development Co. Ltd got the land and that when the church was processing the title it had no encumbrance.

9. On re-examination, PW1 stated that he had authority to act on behalf of the church and that the suit property has not been developed because the defendants are on it and have rejected the deliberations reached in the various meetings that were held.

10. The plaintiff called a second witness Gertrude Manga (PW2) who stated that she has been a congregant of Our Lady of Queen of Peace Catholic Church, Voi for over 40 years and adopted her witness statement filed on 17th September 2011 as evidence in chief. She stated that the suit property was donated to the church by Voi Developmental Co. Ltd and that it was vacant and remained so for some time as the church did not have funds for development. That she is aware of Kilio Cha Haki, the defendants' organization, and knew of several meetings that were held. One of those meetings was attended by the D.O Mr Otieno who asked the defendants to vacate the land for developments to be undertaken but defendants rejected. That the defendants also refused the offer of 7 acres given by the church.

11. On cross examination PW2 stated that she is a member of the Parish Council of Voi Catholic Church but did not produce evidence and also stated that she was not present when the land was donated to the church. She stated that the church obtained the title to the land in 2010 when there were squatters on it and she stated that she did not remember when the defendants moved into the land or when they were offered the 7 acres. She stated that she did not have evidence to prove that it's the defendants who removed the beacons or that they were selling the land to themselves or to others.

12. On re-examination, PW2 confirmed that the defendants refused the land donated to them vide the minutes Min 1/16/12/08 while Min 3/16/12/08 confirms the beacons were removed. She concluded by reiterating that when the land was donated to the church it was vacant. The plaintiff then closed its case.

DEFENDANTS' CASE

13. The defendants entered appearance on 25th October 2011 and filed a statement of defence and counterclaim on 14th August 2012. They denied the allegations of the plaintiff that the church was the registered owner of the suit property and that the defendants had encroached on

it. The defendants put forth a defence that they had acquired rights to the land adversely as they have enjoyed continuous and uninterrupted occupation of the suit property for over 12 years and therefore the suit is time barred by virtue of the Limitation of Actions Act. That the prayers sought in the plaint are unconstitutional for denying the defendants right to accessible and adequate housing and reasonable standards of sanitation.

14. The defendants made a counterclaim that they had been in possession of the suit property for over 12 years and thus acquired rights to it by adverse possession. Further to that the defendants state that they have constructed permanent structures, a school and have been paying land rates to Voi Municipal Council. The defendants similarly alleged that the plaintiff fraudulently and unlawfully carved out LR No 15031/169 from the mother title LR No 15031/20 despite knowing the defendants had acquired rights over it and that the plaintiff moved to the land under the pretext of implementing a water project for the defendants. That the plaintiff has trespassed on the land and erected a convent and school while tricking the defendants with resettlement on a 7 acre land which belongs to Voi Development Company Limited. That the plaintiff's case should be dismissed with costs to the defendants and judgement entered for the defendants for:-

- a) A declaration that the defendants are the legal owners of approximately ten (10) acres of the suit property known as 15031/169 Taita District to the exclusion of the plaintiff and any other party.*
- b) A declaration that the defendants have acquired title to approximately ten (10) acres of the suit property known as 15031/169 Taita District by way of adverse possession and an order for entry of their names on the register.*
- c) A permanent injunction do issue restraining the plaintiff, its agents, servants and/or anybody acting through it or on its behalf from trespassing on the approximately ten (10) acres of the suit property known as 15031/169 Taita District.*
- d) Costs of the suit and interest at court rates.*
- e) Any other relief that this honorable court may deem fit and just to grant.*

15. The defendant called Gerald Nyambu Makanga (DW1). He testified that he is the 26th defendant and he lives in Sikujua Juu in Mwangea subcounty, Taita Taveta County. That he entered the suit property LR No 15031/20 through the village chairman in 1987 where he lives with his family in a permanent house and does farming. That the plaintiff came in 1995 under the pretense of supplying water to the community. That the church was given the land by Voi Development Co Ltd and the defendants had stayed peacefully with the company from 1995 until 2000 when the church constructed a nursery school and they started to threaten them with eviction.

16. The witness further stated that the church offered to give the defendants 7 acres but they did not know where the location of the said seven acres was. The witness stated that he was the secretary of Kilio Cha Haki and together with the chairman Jefferson Nyambu and Father Mwakiriti came to an agreement that the defendants would be resettled on the 7 acres. However when the time came the chairman of Voi Development Co. Ltd stopped the defendants from entering the land. DW1 concluded by asking court to order the Ministry of Land to issue the defendants with titles to the land.

17. On cross examination DW1 stated that he moved from Wundanyi into the land in 1987 and was allocated a portion of land by the then chairman of the village who is now deceased. He also stated that the village chairman was neither a director of Voi Development Company Limited nor was he a registered owner of the land. The witness further stated that the letter dated 26th July 1995 from Municipal Council of Voi to Mr and Mrs Prudence Wakio was over a temporary plot and confirms land rent was paid towards it and further to it, DW1 stated that the letter dated 24th September 1991 showed that the council would demolish the temporary structures (where he lived with permission from the council) if the council needed the land for further use and that he later build his house in 2006 but did not produce approved building plans.

18. The witness stated that 12 years have not lapsed since the church moved into the land, since the church moved in 1995 and the disagreement started in 2000. The witness further admitted to giving contradicting evidence with that he wrote in his witness statement filed in court. He further stated that the 7 acres that would have been given to the defendants was riparian land but could not produce evidence to support the claim. He could not state when the other defendants moved into the land but insisted that the land was ancestral and was paying land rents to the local government.

19. On reexamination, DW1 stated that the issue was between the defendants and the church and not the Municipal Council of Voi. He stated that he did not have documentation to show that he moved into the land earlier than 1995 but insisted that he and other defendants have made lots of development on the land. The defendants then proceeded to close their case.

PLAINTIFF'S SUBMISSIONS

20. The plaintiff filed written submissions on 26th October 2020 and stated that the plaintiff is the registered owner of the suit property and as per Section 26 of Land Registration Act a Certificate of Title is conclusive evidence of proprietorship of land. Further to that the plaintiff submitted that the defendants did not produce evidence to the contrary. That the land was a donation from Voi Development Company Limited and it was transferred to the plaintiff vide a Transfer dated 3rd August 2005 and later a Certificate of Title No 47503 dated 19th March 2010 issued. That the fraud alleged by the defendants must be specifically pleaded and proved on a higher standard than that of balance of probabilities. That the defendants did not produce evidence to prove that the plaintiff's title is unlawful or that it was fraudulently acquired. That, being the legal title holders the plaintiff has a right to all the rights therein and that the defendants have encroached on the suit land and prevented the plaintiff from carrying out any development thereon.

21. The plaintiff further submitted that the claim of adverse possession by the defendants must fail since DW1 confirmed that the defendants never moved to court to have the suit property registered in their names, neither did they enjoin Voi Development Company Limited to claim adverse possession against them as they were original title holders at the time the defendants allegedly encroached on the land. That the

defendants have not adduced any evidence to show when the permission became adverse or hostile to the title of the original and current owner. That the testimony of DW1, contradicts the counterclaim which states that they paid land rates to Voi Municipal Council and a letter dated 24th September 1991, the Council warned them against constructing permanent structures since they were to stay on a temporary basis. That the defendants filed a letter dated 26th July 1995 where Voi Municipal Council demanded Kshs 450 as pay for the temporary plots. That in court DW1 stated that the defendants were allocated land by the village chairman but did not pass title to them and that the testimony is marred with contradictions and departs from the pleadings. That the defendants were staying on the suit property as mere licensees granted temporary permission by Voi Municipal Council and cannot claim adverse possession either from the Council or from Voi Development Company Limited.

22. On adverse possession the plaintiff submitted that time began running against the plaintiff after the land was transferred from Voi Development Company Limited to the church in 2005. More so the plaintiff became the registered owners vide a Certificate of Title No C.R 47503 dated 19th March 2010. That the plaintiff filed the suit in 2011, 8 years after the land was transferred to the plaintiff's name by Voi Development Company Limited and that the statutory period of 12 years was yet to lapse. The plaintiff concluded by praying for judgement to be entered in favour of plaintiff and the counterclaim to be dismissed.

DEFENDANTS' SUBMISSIONS

23. The defendants filed written submissions on 4th December 2020 and submitted that they have been in occupation since 1980s and the plaintiff entered in 1995 thus the 12 years had already lapsed and therefore time barred. That the defendants were not licensees of Municipal Council as permission has to be issued by the registered owner of the suit property. That the Municipal Council never owned the land and they never gave defendants permission to be on the land. That the plaintiff did not adduce evidence of an agreement between the Municipal Council of Voi and the defendants and that the demand letters from the Municipal Council of Voi did not interrupt time running against the plaintiff.

24. Further to that the defendants submitted that time starts running provided the land is delineate, defined and vested in the person against whom the claim for adverse is made. That the time started running from 1995 when the land was donated to the plaintiff till 2011 when the case was filed which is more than 12 years. The defendant further cited different case law that state that transfer of title from one person to another does not interrupt time from running as adverse possession is an overriding interest. That for there to be an interruption of the 12 years the plaintiff has to obtain judgement and in its absence the plaintiff cannot claim interruption.

ANALYSIS AND DETERMINATION

25. Taking the pleadings, the evidence adduced together with the submissions rendered and authorities in support, this Court is tasked to determine the following questions:

- a) Whether the plaintiff is entitled to vacant possession and an order of eviction against the defendants.*
- b) Whether the defendants are adverse possessors to the suit property.*
- c) Whether the plaintiffs are entitled to general damages for trespass.*
- d) Who meets the costs of the suit.*

26. The plaintiff produced a Certificate of Title No CR 47503 dated 17th March 2010 to prove ownership over the suit property. The title did not show any leases, charges and other encumbrances and other conditions and restrictions. More to that the defendants did not produce any evidence to the contrary. This court is guided by Section 26 of the Land Registration Act 2012 to take the Certificate of Title as prima facie evidence that the plaintiff is the proprietor of the land and is the absolute and indefeasible owner. The plaintiff as the registered proprietor has all the rights, interest and liabilities incidental to the suit property.

27. As the registered proprietors the plaintiff is praying for vacant possession from the defendants who are in occupation of part of its 40 acre land that was donated to the church by Voi Developmental Company Limited. The defendants on the other hand plead in their counterclaim that the plaintiff acquired the ownership by fraud. Further to that the defendants claim that they are adverse possessors to the suit property and they have extinguished the plaintiff's rights to the land. They pray that they be registered as the true owners of the suit property by virtue of adverse possession.

28. The doctrine of adverse possession is a common law doctrine where one acquires title to land by occupying the land for at least 12 years for one's own use, and in doing so not with authority from the owner and excluding all persons including the owner. The adverse possessor applies to court to be registered as the proprietor of the land in place of the registered proprietor who will be until registration is effected be holding the land in trust of the stranger in occupation. In Kenya, this doctrine is provided by **Section 7 of the Limitations of Actions Act** that states:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

29. For the defendants to successfully claim adverse possession of the suit property, they must establish on a balance of probability the following elements as held by the **Court of Appeal in Gabriel Mbui V Mukindia Maranya (1993) eKLR**

- i. The intruder must make physical entry and be in actual possession for the statutory period. Time does not begin to run unless there is some person in adverse possession of the land and time does not begin to run merely because the land is**

vacant, adverse possession rests de facto use and occupation by an entrant. There must be actual possession which requires some with sufficient degree of physical occupation for 12 years.

ii. The entry and occupation must be with, or maintained under, some claim or color of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against as against everyone else. In other words the intruder must have some apparent title, the appearance of title but not the reality of it. He must have with him his own apparent right which affords him some semblance of title under which he claims to found his occupation of the land independently of anyone else's power.

iii. The occupation of the land by the intruder must be without permission from the true owner of the land. Permissive occupation or where possession was consensual or contractual cannot be called adverse. Any kind of permissive use, as a tenant, licence, contract purchaser in possession, or easement holder is rightful and not hostile.

iv. The nonpermissive actual possession hostile to the current owner must be unequivocally exclusive and with an evinced unmistakable *animus possidendi* that is to say, occupation with the clear intention of excluding the owner as well as other people. Exclusive possession means that the exercise of dominion over the land must not be shared with the owner. The owner ceases to be in occupation by reason of dispossession or discontinuance of possession. Dispossession is where a person comes in and drives another out of the land; discontinuance of possession is where a person in possession goes out and another person takes possession, in other words the owner has given up, ceases to use and abandons the land and ceases occupation. The fact that nothing has been done on the land to improve is not evidence that the owner has abandoned the possession or has been eliminated from it. The mere fact that for 12 years or more has been no suit brought against a squatter or the mere fact that for 12 years a squatter has been in actual possession of the land is not enough to make Limitation of Actions Act operative. The Act is operative only where there has been exclusive possession for the statutory period for the person to be protected by the statute. It must be shown that the title holder has been dispossessed or has discontinued his possession of the land for the statutory period. The person relying on the statute must prove that he was in exclusive possession and that the true owner was out of possession.

v. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner, unless the acts be done are inconsistent with the owner's enjoyment of the soil for the purpose which he intended to use it. He must show that his possession was of such a nature and involved the exercise of rights so irreconcilable with those claimable by the owner of the land, and gave rise to a cause of action or right to sue for possession throughout the 12 years. Where the true owner of land intends to use it in the future for a particular purpose, but has no immediate use for it so leave is unoccupied does not lose his title to it simply because someone enters on it and uses it for some purpose not even if this purpose continues year after year for 12 years or more (see *Leigh V Jack* 1879 5 Ex D 264) The reason being by using land knowing it does not belong to him, he assumes the owner permits it and by not turning him off the owner impliedly gives him permission. Where the true owner can make no immediate use of the land, as the years go by it cannot be said he would lose his rights as an owner merely by reason of acts of trespass. Time therefore does not run against a true owner whose purposes are not prejudiced by the intruder's acts.

vi. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice by the owner and the community of the exercise of dominion over the land. The owner has an opportunity to notice the intruder if reasonable inspection is conducted. There must be a denial of the owner's right by an open assertion of a hostile title by the person setting up adverse possession and there must be notice of the denial to the owner, either given directly or inferred from notorious acts and circumstances. So notorious must be the overt acts of ouster that there must be nothing that would lead the owner to suppose that his rights remain intact.

vii. The possession must be continuous, uninterrupted, unbroken for the necessary statutory period. The possession by the adverse possessor must continue without significant interruption for a solid block of time at least so long as the period of limitation being at the moment 12 years before filing of the suit. The test is whether the adverse possessor used the land as a true owner would. There are a number of ways in which adverse possession which has begun to grow may be interrupted. Possession may be interrupted:-

a) By the physical entry upon the land by any person claiming the land in opposition to the person in actual possession with the intention of causing interruption.

b) By the institution of legal proceedings by the rightful owner to assert his right to the land; or

c) By any acknowledgement made by the person in possession, to any person claiming to be the rightful proprietor, that such claim is admitted or otherwise recognized.

In light of all these principles that it is stated broadly that a person in possession of land is not entitled to the protection of the statute of limitations as against the owner of land where the latter and his predecessors in title have not been kept dispossessed or have not abandoned possession of the land and the adverse possessor remained in actual possession for the whole statutory period without a break in the block period: *Smith, J, in the Court of Appeal of Eastern Africa in Hassanali Mamuji V Alibhai Ebrahimji Dar & Sons* (1935) 2 EACA 111 at 116.

viii. The rightful owner against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, during the statutory period. If at any time in the course of the running of the time he had no right to claim possession, or he was under a disability or legal impediment, time does not run against him during that spell. The true owner must have the right to immediate possession during the 12 years and if he has no right to immediate possession it is practically immaterial to him who is in possession. Having no right himself to possession, he

cannot eject the person in possession.

ix. The rightful owner must know that he is ousted, he must be aware that he has been disposed or he must have parted and intended to part with possession. Just as the adverse possessor cannot succeed if he did not know he was in actual possession of another's land, the owner who had not intended to part with possession or is unconsciously dispossessed cannot be said to have been evicted or have quit the land.

The burden of proving title by adverse possession rests upon the person asserting it on a balance of probabilities. To prove title by adverse possession it is not sufficient to show that some acts of adverse possession have been committed; the possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the rightful title owner. It must be actual, visible, exclusive, hostile, open and notorious. There has to be a total ouster of the owner from the title and there is no room for tenancy in common or joint tenancy. It is all or nothing.

In case of registered land, adverse possession dates from the granting of certificate of title, for that is when the title holder is prima facie entitled to possession and therefore entitled to take action against any intruder of the land. The land or portion of the land, adversely possessed must be a definitely identified, defined with clear boundaries or identification.

The plea of adverse possession is always based on facts and they must be asserted, pleaded and proved. The person claiming adverse possession must show on what date he took occupation of the premises, the nature of his possession, whether his possession is known to the true owner, how long the possession when on, whether his possession was open and undisturbed. Unless these questions are asserted and proved a plea of adverse possession must fail.

30. Having conclusively and extensively discussed the principles of adverse possession as guided by the Court of Appeal case quoted above, this court now retrieves back to the facts of the case herein to ascertain whether the defendants have on the balance of probabilities proved that they have acquired the title by adverse possession.

31. The plaintiff testified through PW1 that the suit property was donated to the church by Voi Development Company Limited in 1995 and the church intended to build a nursery, primary and secondary schools as well as a polytechnic. At the time of being gifted with the land the church did not have money to undertake the developments and left the land vacant. Despite leaving the suit property vacant, the church had every intention to develop it once funds were available. This cannot be said to mean that the church had abandoned possession of the land. The defendants did not adduce evidence before this court as to how they dispossessed the church from the suit property. They merely moved into a vacant land that the true owner had no use at the moment.

32. The plaintiff produced a Certificate of Title No C.R 47503 dated 19th March 2010 that proves from that moment on, the church was registered owner of the suit property. As stated in Section 25 of the Land Registration Act 2012 only a registered owner has all the liabilities, rights and interests incidental to the land. One of the rights that accrue to a registered proprietor of land is vacant possession and quiet enjoyment. The plaintiff as at 19th March 2010 had every right to evict the defendants from the suit property who were mere trespassers, which they did by instituting this suit in 2011.

33. It is the view of this court that time began to run against the plaintiff immediately they acquired title to the land, reason being only a registered owner of the land has an effective right to make entry and recover possession of the land throughout the 12 years. Between 1995 when the land was donated to the plaintiff and 2010 when the land was registered in the name of the plaintiff, the plaintiff was a simply a donee with no rights to sue and be sued in respect to the suit property as the land still belonged to Voi Development Company Limited for all rights and purposes. So possession was not adverse to the plaintiff who from 1995 to 2010 was not legally capable of evicting the defendants as the plaintiff did not have the rights to possession which can only be acquired by being the registered proprietor of land.

34. Through a series of meetings with the plaintiff, defendants and government officials in attendance, meetings that have been confirmed by both the plaintiff and defendants, the plaintiff was willing and ready to resettle the defendants on a portion of the suit property totaling 7 acres. However the defendants refused to move to the allocated land alleging fraud and that the land was swampy as stated by DW1 who did not adduce evidence to prove fraud or any report to ascertain the land was not suitable for human occupation. In my view, the church was indeed generous and practiced the true spirit of Christianity by trying to resettle the defendants some of whom may have been the church's congregants rather than evicting them.

35. The plaintiff have adduced evidence to prove ownership of the suit property and as such they are entitled to vacant possession as well as quiet possession from the defendants. The defendants on the other hand have failed to prove to court that they were in actual, open, notorious, regular, continuous uninterrupted, hostile, exclusive occupation, without any form of permission from the plaintiff for 12 years in order to claim the suit property by way of adverse possession. This court finds the defendants are intruders into the suit property with no colour of title whatsoever and should be evicted.

36. The defendants in the counterclaim stated that they paid have constructed permanent structures, a school and even paid land rates to the Voi Municipal Council. In the defendant's list of documents filed on 17th October 2012, the defendants attached two letters from the then Municipal Council of Voi. The one dated 24th September 1991 laid down the conditions that the defendants should adhere to in terms of the temporary structures they have been permitted to put up by the Municipal Council, which included not to extend the temporary houses, use temporary materials in repairs and to demolish them when the Municipal Council requires that space, failure to which the Municipal Council was at liberty to demolish without notice. Another letter dated 26th July 1995 was a reminder to pay 'conservancy fees' which was a fee payable to the Municipal Council of Voi to keep the temporary houses between 1990- 1994. The defendants were paying a fee to the Municipal Council of Voi in order to maintain temporary structures on the suit property which were meant to remain temporary and nothing permanent. The defendants therefore were permitted to stay on the suit property before it was donated to the plaintiff. The defendants did acknowledge the authority of the then Municipal Council of Voi by paying the conservancy fees in order to keep their temporary houses. Time therefore did not run against the plaintiff when the defendants were paying the conservancy fees to the Municipal Council of Voi between 1990- 1994. Time began running against the plaintiff when they became registered owners of the suit property with rights, interest

and liabilities. Moreover, it is clear from the evidence on record that the defendants were in occupation and possession with permission as they were paying fees to Municipal Council of Voi. It cannot therefore be said their possession was hostile.

37. In the counterclaim, the defendants allege that the plaintiff fraudulently and unlawfully carved out the suit property from the mother title LR No 15031/20 while being aware that the defendants had already acquired prescriptive rights. Allegations of fraud must always be properly particularized. An allegation of fraud in this instance, if proved can lead to cancellation of title as per Section 26 of the Land Registration Act 2012. Being a serious allegation of misconduct, the defendants have a greater burden of adducing particulars to explain the basis for the allegation. This is especially so where the allegation that is being made is of bad faith or dishonesty. Allegations of fraud must be clear and express and pleaded separately. The defendants did not produce evidence to prove fraud and illegality in how the plaintiff acquired the title to the suit property. In the absence of compelling evidence, the court cannot find fraud on part of the plaintiff in acquiring title to the suit property.

38. The plaintiff has prayed for mesne profits for wrongful occupation of the suit property by the defendants as trespassers. Mesne profits are profits accruing during the time the rightful owner was excluded from his land and having proved to be the true owner of the suit property the plaintiff is entitled to mesne profit. The burden of proof is on the plaintiff to specifically plead and prove what profits he might have received in the ordinary diligence and use of the suit property. The plaintiff though entitled to mesne profit has not claimed any specific sum and has not produced any evidence to support any figure that court could have awarded. In the absence of it, this court refrains from making an award for mesne profits.

39. The plaintiff has also prayed for general damages for trespass and having proved that the defendants is a trespasser the plaintiff is entitled to general damages against the defendants. In the case of **Nakuru Industries Limited -vs- S S Mehta & Sons [2016]eKLR the court observed:-**

“In tort, damages are awarded as a way to compensate a plaintiff for loss he had incurred due to a wrongful action on the part of the defendant. The damages so awarded are intended to return the plaintiff back to the position he was before the wrongful act was committed. In cases where trespass to land results in damage then the computation of damages is on the basis of restitution of land. The value of the soil (or trees or fruits) which have been removed from that land are all factored as well as the cost of restoration of the land to the position it was in before the wrongful act was committed.”

However in so much as the plaintiff is entitled to general damages, there was no evidence that established the exact value of the suit property before and after the trespass or the value of damage that was occasioned on the suit property by the actions of the defendants. Nevertheless the plaintiff is entitled to be compensated for the denial of use of the suit property for over a decade, and for this reason I award the plaintiff damages of Kshs 500,000/= on account of nominal general damages for trespass together with interest at court rates from the date of this judgment until payment in full. I am satisfied that the plaintiff has proved its case on a balance of probabilities while the defendants counterclaim has not been proved to the required standard.

40. I accordingly enter judgment for Registered Trustees of the Catholic Archdiocese of Mombasa against the all the defendants jointly and severally and make the following orders:-

a) The defendants counterclaim is dismissed.

b) The defendants be and are hereby ordered to vacate and deliver vacant possession of the suit property, Land Reference No 15031/169 to the plaintiff within 30 days from the date of service of the decree herein upon them.

c) In default of compliance with (b) above as aforesaid the plaintiff shall be entitled to an order of eviction for the forcible removal of the defendants, their agents and/or servants from Land Reference No 15031/169 upon application.

d) A permanent injunction be and is hereby issued restraining the defendants whether by themselves or their servants or agents or otherwise howsoever, from remaining on or continuing in occupation of the suit property.

e) The plaintiff is awarded Kshs. 500,000/= as general damages for trespass together with interest at court rates from the date of judgment until payment in full.

f) Costs of the suit are awarded to the plaintiff to be borne by the defendants jointly and severally.

DATED, SIGNED and DELIVERED at MOMBASA this 15th day of March, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE