



Vihiga Farmers Company Ltd & another v African Israel Church (Through Zachel Shidode, Renal Alodi & Francis Ajega) & another (Environment & Land Case 242 of 2013) [2023] KEELC 19846 (KLR) (20 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19846 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 242 OF 2013

JM ONYANGO, J

SEPTEMBER 20, 2023

**IN THE MATTER OF THE LIMITATION OF ACTIONS
ACT CAPP 22 OF THE LAWS OF KENYA AND**

**IN THE MATTER OF SECTIONS 28 & 30 OF THE REGISTERED LAND
ACT CAP 300 AND IN THE MATTER OF ADVERSE POSSESSION IN
RESPECT TO L.R NO. LUGARI/LIKUYANI BLOCK 1 (VIHIGA) /243 & 244**

BETWEEN

VIHIGA FARMERS COMPANY LTD 1ST PLAINTIFF

WYCLIFFE OYNDI BURUKU 2ND PLAINTIFF

AND

**AFRICAN ISRAEL CHURCH (THROUGH ZACHEL SHIDODE, RENAL ALODI
& FRANCIS AJEGA) 1ST RESPONDENT**

**LUGARI YEARLY MEETING OF RELIGIOUS SOCIETY OF FRIENDS
CHURCH (THROUGH EPHRAIM MALENYA, ROGERS WAMBA &
JONATHAN OBEMBO OMBIMA) 2ND RESPONDENT**

RULING

1. By a Notice of Motion dated 18th November 2022, African Israel Church (the 1st Respondent) filed an application seeking the following orders:
 - a. That this Honourable Court confirms the eviction notice dated 28.6.22 and proceeds to order the vacation (sic) and/or eviction of one Wycliffe Oyondi Buruku from land Reference number Lugari/Likuyani Block 1 (Vihiga)/243, the suit land herein together with his agents, servants, employees and/or any other person acting on his behalf.



- b. That this honourable court awards general damages to the 1st Respondent for unlawful, illegal and/or wrongful utilization and/or occupation of the suit land by the said Wycliffe Oyondi Buruku.
 - c. That the costs of this application be provided for.
 2. The application is premised on the grounds enumerated on the face of the Notice of Motion and the Supporting affidavit of Francis Ajega. The background of the application is that the 1st Respondent is the registered proprietor of all that parcel of land known as Lugari/Likuyani Block 1 (Vihiga)/243 measuring approximately 0.660 hectares. In the main suit Vihiga Farmers Company Ltd (the company) instituted a suit by way of Originating Summons dated 4th April 2013 against African Israel Church (the Church), seeking to be declared as the owners of the land parcels No. Lugari/Likuyani Block 1 (Vihiga)/243 and 244 by virtue of adverse possession.
 3. African Israel Church filed a Replying affidavit dated 24th April, 2013 sworn by Francis Ajega denying the claim. Owing to the fact that the Company had failed to set the case down for hearing, the church, by an application dated 14th June 2016 sought to have the suit dismissed for want of prosecution. By its ruling dated 17th October 2019, the court dismissed the application in order to give the Company a last chance to prosecute their case.
 4. The case was subsequently fixed for hearing on 30.11.201 when none of the parties appeared and the suit was dismissed for want of prosecution. Following the dismissal of the case, the church issued a 90 days eviction notice dated 28th June, 2022 to one Wycliffe Oyondi Buruku. It is the said eviction notice that the church wants the court to confirm.
 5. In his supporting affidavit Mr. Francis Ajega deposes that he is the Chairman of African Israel Church. It is his further averment that in 2019, while the main suit herein was pending in court, the said Wycliffe Oyondi Buruku trespassed onto the suit property and erected a semi-permanent structure thereon. That as a result of the Mr Buruku's unlawful action, the Church has been deprived of its right use and occupy the suit property.
 6. The application is resisted by Wycliffe Oyondi Buruku through his Replying affidavit sworn on 20th February 2023 in which he states that he is not a party to the suit herein and he is therefore a stranger to these proceedings. He avers that his late father Jafferson Buruku was a member of the Vihiga Farmers Company Ltd when he bought land through the said company and settled thereon in 1979. The said Jafferson Buruku died in 2010. Wycliffe deposes that he was born on the suit property and the Church found him on the said land. It is his contention that the Church obtained the title to the suit property by way of fraud as the same was obtained during the pendency Kakamega HCCC No. 344 of 1988 Vihiga Farmers Company Ltd v Attorney General in which the company challenged the introduction of new members into the company who were also given land. In its judgment dated 14th May 1990, the court ordered that land reverts to the company and that the original owners do process their respective titles.
 7. The Applicant filed a Further Affidavit in which he clarified that in the main suit between Vihiga Farmers Company and the Church, the company was seeking orders of adverse possession of the suit land but the suit was dismissed. He explained that the Respondent in this application Wycliffe Oyondi Buruku is occupying the suit property as a member of the plaintiff company and that since the company is a party to the suit there was no need to file a fresh suit against Wycliffe.
 8. He further averred that under Section 152E of the Land Act No. 6 of 2012 the party seeking to evict a person is required to issue a 90 days notice which is what the Applicant has done. He averred that rather than challenge the eviction notice, the Respondent has raised the issue of ownership of the suit



property yet the Company's suit was dismissed. The Respondent's father Jefferson Buruku Oyondi subsequently sued the church, vide Kitale HCCC No. 22 of 2007 but the suit was dismissed on 25th May, 2010. It is his contention that the Respondent has not obtained a grant of letters of administration to enable him deal with the suit property which he claims to belong to his late father. Furthermore, he has not produced any evidence to show that the Applicant's title to the suit property has been cancelled.

9. The application was prosecuted by way of written submissions but only the Applicant filed his submissions.

APPLICANT'S SUBMISSIONS

10. In his submissions dated 20th June 2023, learned counsel for the Applicant gave a background of the matter and submitted the application was filed within this suit as the Respondent is a son of a member of Vihiga Farmers Company Ltd who is the Applicant in the main suit. He added that the application is directed at the Respondent as he is the one who has encroached on the suit property.
11. He submitted that even though the Respondent alleges that the suit property is their family land, in the main suit, the company claims to be the owner of the land.
12. It was his submission that the Respondent was served with the eviction notice in accordance with section 152E of the *Land Act* as he is the one who is in unlawful occupation of the suit property. He further submitted that since the Respondent had failed to challenge the notice, the Applicant had moved the court to confirm the eviction notice and proceed to issue an eviction order against the Respondent. He submitted that under Article 159 (2) (a) and (d) of *the Constitution*, the court was enjoined to resolve disputes in a just manner while ensuring that the ends of justice are met. He added that justice would not be realized if the Respondent is allowed to continue occupying the suit land unlawfully.
13. Counsel submitted that the Applicant ought to be compensated by an award of general damages for the unlawful and wrongful occupation and utilization of the suit land by the Respondent. He relied on the cases of Joyce Wairimu Karanja v Edward Murangiri Mugambi (2014) eKLR; Ramadhan Makal Langalanga (2022) eKLR and Margaret Bashforth v Wobourn Estate Limited & Another (2021) eKLR where the Court awarded general damages for trespass.

ANALYSIS AND DETERMINATION

14. I have considered the Notice of Motion, the Replying affidavit and the Applicant's submissions together with the authorities cited by the Applicant. It is common ground that the Respondent is the son of Jefferson Buruku (Deceased) who was a member of Vihiga Farmers Company Ltd. The said company filed this suit seeking to be declared as the owner of the suit land which is registered in the name of Africa Israel Church, by way of adverse possession. The suit was dismissed for want of prosecution.
15. The Respondent claims that he is occupying land that belonged to his late father and that he was born there since he was born. He has also claimed that he was not a party in the suit filed by Vihiga Farmers Company. When the court dismissed the suit filed by the company, no eviction order was issued against them as the Church had not filed a Counterclaim for eviction. It is therefore clear that the Applicant's application for eviction is not anchored on any suit. Furthermore, the Applicant claims general damages which cannot be issued in the absence of a substantive claim for trespass. The cases cited by the Applicant are distinguishable from the instant suit as they were substantive suits which the court considered on merit before awarding general damages.



16. The eviction order sought by the Applicant has far-reaching consequences as it entails the forceful removal of the Respondent from land that he has been in occupying since he was born. Before such an order is given the court must be convinced of its merits which means any person who stands to be affected by any order the court may make is entitled to be heard. Section 152E relating to eviction from private land envisages that there is no dispute on ownership and the occupation is unlawful. The Respondent in this case claims that the Applicant obtained its title fraudulently. I also find it problematic that the application has been made within a dismissed suit in which the Respondent was not a party.
17. Although Section 152E of the *Land Act* provides that one may issue a notice to a person who is in unlawful occupation of private land, it is not clear how a party ought to approach the court for relief under section 152F of the Act. Given the contentious nature of the issues raised herein, it would be inappropriate to grant an eviction order in the summary manner proposed by the Applicant. In the case of *Hillarione Kabutani & Another v George Kiruki Mwamba & Another* (2019) eKLR, the court faced with a similar situation held as follows:
- “The starting point is that THERE IS NO SUIT! This case died and was not reinstated. On what basis would the court then be issuing the orders sought therein”
- Secondly it is imperative to note that the applicants/defendants had not filed a counter claim to the suit. Thus their notice of motion is hanging on air, sitting on nothing! I am hence in agreement with plaintiff’s pleadings that the application is bad in law as it is not based on any proper claim, pleadings or judgment.”
18. I concur with the above decision and find that the application herein lacks merit. The application is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF SEPTEMBER, 2023

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J.M ONYANGO

JUDGE

In the presence of;

Mr. Were for the Applicant

No appearance for the Respondents

