



Mbugua (Suing on His Own Behalf and on Behalf of Members of Bedsango River Farmers Group) v Arch Diocese of Nairobi Registered Trustees & 2 others (Environment & Land Case 1177 of 2014) [2023] KEELC 20795 (KLR) (12 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20795 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1177 OF 2014
LC KOMINGOI, J
OCTOBER 12, 2023**

BETWEEN

BONFACE MBUGUA (SUING ON HIS OWN BEHALF AND ON BEHALF OF MEMBERS OF BEDSANGO RIVER FARMERS GROUP) PLAINTIFF

AND

ARCH DIOCESE OF NAIROBI REGISTERED TRUSTEES 1ST DEFENDANT

FATHER PATRICK KANJA WACHIRA 2ND DEFENDANT

EDELVALE TRUST 3RD DEFENDANT

JUDGMENT

1. The Plaintiffs through the Amended Originating Summons filed on 1st September 2016 claim that they have been in exclusive and quiet possession of the property LR No. 12293/7 (IR 81919) measuring approximately 5 hectares (herein after referred to as “the suit property”) for more than 12years. That on or about 29th May 2014 the Defendants hired goons to enter the suit property and destroy various types of crops belonging to the Plaintiffs. The Plaintiffs claim that some of the attackers were arrested and charged for malicious damage to property. This attack caused the Plaintiffs to file this suit to protect their rights and interests over the suit property. The Plaintiffs went on to state that on 10th February 2015 during the pendency of this suit, the Defendants once again caused people to attack them leading to loss and damage of property and their livelihood. They thus sought for twelve prayers summarised as:
 1. That it be declared that the said portion of land is no longer part of the Defendant’s land and their claim is extinguished by the Plaintiffs having adversely acquired the same from the Defendants;
 2. That it be declared that upon expiry of the 12 years, the Defendants held the same portion of land in trust for the Plaintiffs;



3. That an order under Section 38 of the *Limitation of Actions Act* that the Plaintiffs be declared and registered as the absolute owners of the said portion of land exclusively held, possessed, occupied and utilised by them;
 4. That an order compelling the Defendants jointly and severally to execute all such documents, as would facilitate the registration of the transfer of the said portion of land in favour of the Plaintiffs and in default the Deputy Registrar of this court to execute all such documents.
 5. That it be declared that the Defendants jointly and severally maliciously and unlawfully destroyed Plaintiffs (sic) on the said portion of land and they should the Plaintiffs (sic) general damages thereof as such be determined by court;
 6. That the Defendants jointly and severally be ordered to pay:
 - i. General damages for malicious damage to property plus costs and interest thereof,
 - ii. General damages for physical torture and harassment,
 - iii. General damages for mental torture and trauma,
 - iv. Lost income and/or lost agricultural income of Kshs. 7,667,000,
 - v. Special damages for destruction of property worth Kshs. 7,667,000,
 - vi. Costs and interests.
2. In his Supporting Affidavit dated 1st September 2016 Boniface Kamau Mbugua averred that he is the Chairman of Bedsango River Farmers Group which was registered as a Community Based Organisation (CBO) on 10th September 2012. The Community Based Organisation has over a hundred members from Soweto Estate who earn their living from farming on the suit property and selling the produce and had been on the suit property since time immemorial. It was until sometime in June 2013 when the area Chief informed them that the Catholic Church wanted them to vacate the suit property vide a letter dated 20th June 2013 from Edelvale Homes and sometime in April 2014 they were once again informed by the area chief that the 2nd Defendant had issued another written notice to that effect.
 3. He indicated that on 29th April 2014 they requested for the Deputy County Commissioner's intervention which did not materialise and on 27th May 2014, they petitioned the Cabinet Secretary- Ministry of Land, Housing and Urban Development to stop any development on the suit property. However, on 29th May 2014 a group of about 200 men invaded the suit property and destroyed, carted and burnt the crops thereon. This issue was reported to different departments of police and criminal charges preferred against some of the assailants. Additionally, on 2nd July 2014 an Agricultural officer went to assess the damage caused and filed a valuation report. However, the Plaintiff claimed that the actual amount of damage was not captured because of the length of time taken in assessing it. As such, they also caused another valuation report to be undertaken. He went on to aver that despite the attack, they were still on the suit property and ought to be declared as the owners through the doctrine of adverse possession and compensated for the loss and damage of their crops and mental trauma.



4. The 2nd Defendant in his Replying Affidavit stated that he was the priest in charge of St. Jude's Church, a parish under the 1st Defendant. The 3rd Defendant gave them a portion of the suit property (which is their land) to construct a church. He deponed that no other person was in occupation of the suit property save for some sugarcane planted on it which sometime in May 2014 the community agreed to cut down due to the insecurity that was being caused by it. He indicated that he was summoned at Soweto Police Station to respond complaints by alleged owners of the sugarcane but the matter was laid to rest when upon proof that the 3rd Defendant was the owner of the suit property. As such, the claim for adverse possession could not be sustained since the Plaintiffs had not met its ingredients neither had they been in open, quiet and uninterrupted possession.
5. Florence Motono Kisilu the 3rd Defendant's Chairperson swore a Replying Affidavit where she deponed that the 3rd Defendant was a registered charitable organisation which was granted LR No. 11256 in 1961 measuring approximately 33.5 acres and had been in possession since then and had caused its subdivision including LR No. 12293/7 which was being claimed by the Plaintiffs. From the subdivided land they gave a portion to the Donholm Catholic Church to put up a church and leased out another portion to Zhongmei Engineering Group Ltd to store their materials. As such the doctrine of adverse possession was inapplicable adding that there are people who had been trespassing on the suit property and they had made reports at Soweto Police station on the issue. She went on to depon that sometime in May 2014 they made efforts to clear bushes around the suit property that had become a source of insecurity in the area.

Evidence of the Plaintiff's

6. The Plaintiff Bonface Kamau Mbugua testifying as PW1 adopted his witness statement as his evidence in chief and adduced his bundle of documents as evidence. He stated that he together with members of Bedsango had been farmers at Savannah in Soweto for over forty (40) years growing crops such as sugarcane, bananas, cassava etc for home consumption as well as for sale. He stated that he inherited farming on the suit property from his grandfather. He testified that he was summoned by the area chief and asked to vacate the suit property although the Defendants had never asked them to move. Later a group of over 200 people sent by the 2nd Defendant invaded the suit property and slashed down their crops. He thus sought for compensation of the loss and damage as well as declaration that they were the rightful owners of the suit property.
7. On Cross-examination he re-stated that he inherited farming on the suit property from his grandfather although he did not have anything to show for it. He also testified that they used the suit property which was in Kayole only for farming but were residents of Soweto. He restated that he was informed by the area chief that the 2nd Defendant wanted to use the suit property and to stop them from farming. Therefore, insecurity was not the reason they cut down the sugarcane. He confirmed that the 2nd Defendant was not present during the alleged invasion and cutting down of the crops but he assumed he sent the people who cut down the crops because he is the one who wrote the letter asking them to vacate the suit property. He also confirmed that in 2006, the 3rd Defendant put up a fence on the suit property.
8. On re-examination he re-affirmed that in 2006 a fence was put up on the suit property but they were never asked to vacate.
9. Testifying as PW2 was Joseph Ndung'u Githei the Vice Chairman of Bedsango. He adopted his witness statement and indicated that he had been a farmer on the suit property for over 15 years and confirmed that he knew the Defendants because he had seen them on several occasions as he was farming. He confirmed that their crops were destroyed by some people and although the 2nd Defendant was not



- part of the group that destroyed the crops, he went to the suit property at around 1PM to assess the damage. He concluded by asking for the suit property to be issued to them.
10. On cross examination he confirmed that the suit property was in Kayole but he was a resident of Soweto. He stated that his parents had been farmers on the suit property although he did not have evidence to show for it. He went on to state that the people who cut down their crops were hired by the 2nd Defendant although he did not have evidence to prove this allegation. He also stated that some of the people who cut down the crops were arrested but he did not know what the outcome of the arrest was. He confirmed that there was a fence on the suit property although they were still farming on it. He concluded by asking for compensation from the 2nd Defendant on the ground that he is the one who wrote the letter asking for their eviction of the suit property.
 11. On re-examination he stated that for the fifteen (15) years he had been cultivating the suit property no one had asked them to vacate despite the fact that the Defendants kept visiting the suit property.
 12. Testifying as PW3 was John Njoroge Karori a valuer who produced the report dated 30th June 2016 as his evidence. He testified that when he visited the suit property he did not see the damage of the alleged slashed crops because he visited the suit property on 19th June 2016 while the alleged destruction took place on 29th May 2014. He confirmed that his report was generated based on information he received from eye witnesses and also confirmed that the photographs attached on the report were neither taken by him nor did he acknowledge their source in the report. He indicated that from his visit, the expected yield of the alleged crops slashed was Kshs. 5,634,400 although the amount stipulated in his report was Kshs. 7,667,000. He stated that the price was an estimate based on the market value, acreage of the suit property and damaged crops. He also informed court that when he visited the suit property, the farmers had already been evicted from it.
 13. On re-examination he confirmed that in his report he used pictures he received from the farmers and when he visited the suit property it was fenced although there was some vegetation growing on it.

Evidence of the Defendants

14. The 2nd Defendant Patrick Kanja a Catholic Priest with the 1st Defendant testified as DW1. He adopted his witness statement and replying affidavit as his evidence in chief. He stated that the 3rd Defendant was a charitable organisation at St. Jude's Parish where he was the priest. He testified that the 1st Defendant got the suit property from the 3rd Defendant as a donation and they wanted to construct a church on it. He confirmed that on 29th May 2014 the sugarcane that was on the suit property was slashed down because the neighbouring community had made complaints about insecurity emanating from its presence as it was providing a hideout for thugs. He stated that when the sugarcane was cut down, he was summoned at the Soweto Police Station where he filed his statement of events.
15. On cross examination he confirmed that he had documents to show that the suit property was donated to the 1st Defendant by the 3rd Defendant pointing out that the suit property was fenced. He indicated that although he could not remember the exact date when the sugarcane was cut, he had written to the area chief asking for people who were cultivating on the suit property to vacate.
16. On re-examination he stated that he neither saw the Plaintiffs planting on the suit property nor was there evidence to confirm that the sugarcane on the suit property was planted by them.
17. Florence Motono Kisilu testified as DW2 on behalf of the 3rd Defendant. She stated that she was a nun and a member of the 3rd Defendant and that in 2019 she was its Sister Superior. She adopted her Replying Affidavit as her evidence in chief. She stated that the land was leased to them by the Government of Kenya in the 1960s and there were different institutions on it including a children's



home. She confirmed that the 3rd Defendant over the years subdivided the land and donated the suit property to the 1st Defendant to build a church on it. She indicated that in 2013, they drafted a letter asking people to vacate from the suit property and in 2014 the neighbouring community asked them to clear the bush and vegetation that was on the suit property because it had become a source of insecurity in the area. She confirmed that when the bush was cleared she was summoned at Soweto Police Station to explain the events that had occurred.

18. On cross examination she confirmed that they acquired the land in 1960 and in 2006 the whole land was fenced although a portion of it which is the portion of the suit property fell off. She indicated that there were people farming on it but they were trespassers. She also confirmed that when the community pressed for clearance of the bush on the suit property, the same was done by children from the children's home. She stated that they did not require consent to clear the bush and vegetation which was on their property. She also stated that whereas she did not see the Plaintiffs cultivate on the suit property, she saw them at Soweto Police Station when they filed the complaint.
19. On re-examination she admitted that the Plaintiffs reported the matter at Soweto Police Station and also pointed out that she is the one who gave the Plaintiffs notice to vacate the suit property. She also gave the police a copy of the title.
20. At the close of the oral testimonies, parties were directed to file final written submissions.

The Plaintiff's Submissions

21. As at the time of writing this judgement the Plaintiffs had not filed their submissions.

The 1st and 2nd Defendants submissions

22. Counsel for the 1st and 2nd Defendants summarised the case and submitted on the following issues for determination.
23. Whether the Plaintiff had met the threshold for grant of orders of adverse possession as outlined in *Gabriel Mbui vs Mukindia Maranya* [1993] eKLR counsel submitted that the Plaintiffs not only admitted that they have never been in physical possession of the suit property but also did not adduce any evidence to prove that they had been cultivating on the suit property since the 1970s having inherited it from their parents and grandparents. As such, having not been in physical possession of the suit property, time has never begun to run and the claim for adverse possession should therefore fall making reference to *Peter Mbiri Michuki & Samuel Mugo Michuko* (1980) KLR. Counsel added that even assuming they had been in possession, the said possession was not continuous as required because in 2006 the 3rd Defendant constructed a perimeter fence on the suit property thus breaking the alleged possession as was held in *Kasuve vs Mwaani Investments Ltd & 4 others* 1KLR 184. As such the Plaintiffs did not discharge their burden of proof in the claim for adverse possession citing *Mamuji vs Dar* [1953] 2 EA CA 111.
24. The second issue for determination was whether the Plaintiffs had proved the claim for general damages for malicious destruction of property, physical and mental trauma. Counsel submitted that the Plaintiffs did not prove that they had been cultivating on the suit property and that their produce was destroyed in May 2014 as espoused by Section 107 of the *Evidence Act*. Adding that the photos adduced in court bore dates between April and June 2015 which was a year after the incident. Counsel went on to submit that the witnesses had also testified that they did not know who cut down the crops. It was also submitted that the evidence produced showed that the alleged assault against Bonface Kamau took place on 26th October 2015 and 31st July 2014 and not in May 2014 when the cutting of



crops happened. PW1 also acknowledged that he was not assaulted by the Defendants. Therefore the claim for general damages should also fail.

25. On the claim for special damages of Kshs. 7,667,000 counsel submitted that the valuation report produced to support the claim should be disregarded since it was inadmissible on grounds that: it was generated two years after the incident occurred; the valuer confirmed that when he inspected the suit property he did not see the damaged crops; he confirmed that he did not take the photographs used and did not produce evidence to show that the Plaintiffs derived an income from the damaged crops. As such the report was hearsay relying on *Sammy Nzulu vs Gregory Kithuka Kithembe* and the threshold for a claim of special damages had not been attained citing *Swalleh C. Kariuki & Another vs Violet Owiso Okuyu*.
26. Finally counsel submitted that costs follow the event and it would be fair for the Plaintiffs to bear the costs of the unmeritorious suit filed.

The 3rd Defendant's Submissions

27. Counsel for the 3rd Defendant also submitted on the issue of open, continuous and exclusive use of the property indicating that the Plaintiffs had not proved this citing *Virginia Wanjiku Mwangi vs David Mwangi Jotham Kamau [2013] eKLR*, *Titus Kigoro Munyi vs Peter Mburu Kimani (2015) eKLR*, *Kasuve vs Mwaani Investments Ltd & 4 others [2004] 1KLR 184* and *Wakabala vs Okumu* where court held that mere presence of crops on land did not mean that the grower of the crops was asserting a claim of ownership on the land.
28. On the issue of compensation counsel submitted that having ascertained that the Plaintiffs claim was unmerited, they were not entitled to any damages also adding that the valuers report was not based on facts.
29. Counsel also submitted that the Plaintiffs should be bear the costs of the suit.

Analysis and Determination

30. I have considered the pleadings, evidence on record, the rival submissions, authorities cited. The issues for determination are:
 - i. Whether the Plaintiffs have proved that they are entitled to be declared owners of suit property LR No. 12293/7 by virtue of its adverse possession.
 - ii. What orders should issue?
 - iii. Who should bear costs of this suit?
31. The Plaintiffs claim that they are entitled to the suit land by the doctrine of adverse possession because they, their parents and grandparents had been cultivating on it from the 1970s although they did not have evidence to prove this. It cannot be gainsaid that he who alleges must prove and this is the position stipulated by Sections 107, 108 and 109 of the *Evidence Act*.

107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

32. Further, PW1 and PW2 testified and confirmed that they had only been cultivating on the suit property but resided elsewhere. Counsel for the Defendants submitted that the Plaintiffs had not met the set threshold for adverse possession because they were not in physical possession of the suit property neither had they discontinued the registered proprietor's use of it. What have courts pronounced regarding this position?

33. The Court of Appeal in *Samuel Kihamba v Mary Mbaisi* [2015] eKLR held:

“... Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land...

This Court in *Kasuve v. Mwaani Investments Ltd. & 4 Others* (2004) KLR 184 at page 188 decided that:

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition. See *Wanje v. Saikwa* [1984] KLR 284.”

Accordingly, when determining a claim in adverse possession the court must consider two questions: firstly, whether the owner has been dispossessed openly or willingly and secondly whether the claimant has been in uninterrupted possession for 12 years with an intention to own the land.

34. This position was recently affirmed by the Court of Appeal in *Mount Elgon-Beach Properties Limited v Kalume Mwanongo Mwangaro & another* [2019] eKLR.

35. From the foregoing, this Court is not convinced that the Plaintiffs have been in possession of the suit property and discontinued the 3rd Defendant from the use of it. The court notes that all parties also confirmed that in 2006 the 3rd Defendant put up a perimeter wall on the suit property which confirms that the 3rd Defendant for all intents and purposes has been in possession of the suit property.

36. The claim of adverse possession which is literally taking away someone's land is a claim that requires proof beyond just stating that someone has been in possession. Courts are required to be extremely vigilant and cautious before such orders are granted otherwise many people would lose their land to unscrupulous and undeserving people on the claim of adverse possession. Just like the claim of fraud,



the claim for adverse possession should not only be pleaded but strictly proved. And should the court have any doubts in its mind whatsoever, then the claim should fail.

37. In this particular case, the Plaintiffs have failed to prove their claim for adverse possession.
38. The Plaintiffs also claimed general and special damages to a tune of Kshs. 7,667,000/= for the loss and damage of the destroyed crops on the suit property. DW1 and DW2 confirmed that in 2014 there was vegetation and sugarcane on the suit property which was cut down by the neighbouring community due to insecurity concerns because it had become a hiding ground for thugs. The Plaintiffs called a valuer who testified as PW3 and produced a report he generated upon visiting the suit property. He stated that he visited the suit property in 2016 which was two years after the alleged damage had occurred and as such did not see any destroyed crops on the suit property. He only relied on testimonies of eye witnesses. He also confirmed that the photographs attached on the report which were dated 2015 were neither taken by him nor were they acknowledged. He also stated that the value of loss and damage in the report was based on an approximate market value of the alleged destroyed crops. Crops that he did not see but relied on hearsay.
39. Counsel for the 1st Defendant submitted that PW3's testimony and report was based on hearsay and therefore inadmissible. This court agrees with counsel. Rules of evidence dictate that assertions made by a person or a witness who is not the one testifying should be considered as hearsay and inadmissible because it is not original evidence. The Court of Appeal in *Maina wa Kinyatti v Republic* [1984] eKLR pronounced that "...It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement..." The object of the valuation report was to establish the truth and validity of the claim of loss and damage. the plaintiffs could not expect the court to rely was generated two years after the alleged loss. I decline to rely on the said report as proof of special damages allegedly suffered by the plaintiffs.
40. The claim for general damages also fails because the court has already established that the Plaintiffs did not prove their presence on the suit property or any alleged cultivation thereon.
41. In conclusion I find that the plaintiffs have failed to prove their case as against the Defendants on a balance of probabilities. The plaintiff's suit is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 12TH DAY OF OCTOBER, 2023.

L. KOMINGOI

JUDGE

