



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL SUIT NO. 228 OF 2012**

**DR. PATRICK MARAI MUNGAI..... PLAINTIFFS**

**BISHOP JOHN ITHONGEKE**

**REV. MARK MUGEKENYI**

**VERSUS**

**AFRISON EXPORT IMPORT LTD..... 1<sup>ST</sup> DEFENDANT**

**HUELANDS LIMITED..... 2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiffs by an originating summons dated 2<sup>nd</sup> May 2012 and filed in court on the same date seeks a declaration that they are entitled to be registered forthwith as owners of a portion of 1.8 acres out of L.R. NO. 7879/4 which the Plaintiff has been in adverse possession since 1995 to date for more than 12 (twelve) years immediately preceding the presentation of this suit and, on which they have lived openly and continuously as of right and in adverse possession and without any interruption from the Defendants or its predecessor and that the Defendants title to parcel **L.R. NO. 7879/4** has been extinguished in favour of the Plaintiff under **section 37** and **38** of the Limitation of Actions Act Cap 22 Laws of Kenya. The Plaintiff thus seeks an order that L.R. **NO. 7879/4** be subdivided and 1.8 acres be excised from **L.R. NO. 7879/4** and be vested/transferred in the Plaintiff.

Simultaneously with the originating summons the Plaintiffs filed a Notice of Motion of even date seeking a temporary injunction restraining the Defendants from evicting the Plaintiffs or in any manner interfering with the portion of 1.8 acres that the Plaintiffs occupied and possessed in L.R.NO.7879/4 pending the hearing and determination of this suit. The plaintiff's application is supported inter alia on the following grounds that appear on the face of the application:-

- a. That the plaintiff has occupied the suit land since 1995 and have constructed a church and other structures therein.
- b. That the Defendants have threatened to forcefully evict the plaintiff by use of any means necessary to demolish the plaintiffs buildings and the defendants have issued a notice to vacate.
- c. The Plaintiff has a prima facie case having acquired ownership of the 1.8 acres out of the suit land by virtue of their continuous open uninterrupted occupation of the suit land.
- d. The Plaintiff will suffer irreparable loss unless the defendants are restrained from evicting them or alienating the land.

The Plaintiff's application is further supported on the grounds and facts contained in the supporting affidavit deposed by Dr. Patrick Marai Mungai on 2<sup>nd</sup> may 2012 and a supplementary affidavit dated 24<sup>th</sup> September 2012. The Defendants oppose the plaintiffs application on the grounds contained in the replying affidavit sworn by **Geoffrey Mutisya** a director of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 16<sup>th</sup> July 2012. The parties have further to the directions of the court filed written submissions articulating their respective positions in the matter.

The facts that are not in dispute are that the Plaintiff sometime in 1985 requested the Defendants who were the registered owners of **.L.R 7879/4** (the suit land) to permit and allow them to construct and develop a church in the suit property. Following some exchange of correspondence the Plaintiffs entered into possession and started development on a portion of land that the plaintiffs claim extends to about 1.8 acres and constructed thereon a church, a nursery school, fenced and planted trees and crops and that they have remained in occupation and have been in uninterrupted possession of the portion ever since. The Defendant states that the Plaintiffs were to purchase a portion of 1 acre and develop the same in compliance with the Defendants requirement. The Defendant states that the Plaintiffs did not honour the agreement to purchase and contend that the plaintiffs are in trespass in the suit property and are unlawfully occupying the plaintiffs property.

The Plaintiffs for their part contend that they have been in adverse possession of the parcel of 1.8 acres for a period of over 12 years and have consequently become entitled to be registered as the owners of the same under the provisions of the limitation of Actions Act Cap 22 of the Laws of Kenya. In the filed submissions the plaintiffs have submitted that they have a prima facie case that meets the threshold established in **GIELLA –VS- CASSMAN BROWN CO. LTD (1973) EA 358** for the grant of an injunction. The plaintiff argues that they have been in continuous open possession that has been uninterrupted for a period of over 12 years and that this has operated to extinguish the Defendants title to the portion of 1.8 acres in their favour. The plaintiffs have referred the court to the cases of **EUNICE KARIMI KIBUNJA –VS- MWIRIGI M'RINGERA KIBUNJA (2013) e KLR KIPKETER TOGOM –VS- ISAACK CIPRIANO SHINGORE (2012) e KLR** to illustrate what constitutes continuous, open possession and further the cases of **JASON MASAI –VS- MASAI KIPSAMU ( KSM CA BO. 181 of 1996) and GEORGE M. KOIGI – VS- FRANCIS K. KOIGI (2006) e KLR** to illustrate what amounts to uninterrupted possession. In the two referred cases the court held that it takes more than writing a demand letter to interrupt possession.

The Plaintiffs have further argued that they would suffer irreparable harm if they are to be evicted from the parcel of land where they have built a house of worship and a nursery school and have further submitted the balance of convenience would tilt in their favour and have urged for an injunction to issue against the defendants as prayed.

The Defendants for their part have questioned the constitutionality of the claim for adverse possession and by extension the provisions of the limitation of Actions Act Cap 22 of the Laws of Kenya sections 35, 37 and 38 to the extent that they aid the deprivation of property without any compensation on the basis that a party has been in adverse possession. Article 40 (1) of the constitution of Kenya, 2010 provides as follows:-

**40 (1). “subject to Article 65, every person has the right, either individually or in association with others to acquire and own property:-**

- a. **Of any description, and**
- b. **In any part of Kenya.**

**(2) Parliament shall not enact a law that permits the state or any person:-**

**(a) “to arbitrarily deprive a person of property of any description or any interest in, or right over any property of any description”.**

It is the Defendants argument that the current constitution altered the position that obtained under the now

repealed constitution section 75 which appears to under section 75 (1) ( c ) to have provided for deprivation of property under the doctrine of adverse possession but this is no more.

Section 75 of the repealed constitution provided thus:-

**75.(1) “ No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except where the following conditions are satisfied:-**

**(a) the taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development and utilization of property so as to promote the public benefit, and**

**(b) the necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property, and**

**(c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation”.**

The argument by the Defendant raises a pertinent issue is not and without merit but owing to its substantial nature I do not consider that it would be appropriate to make a determination on the issue at this interlocutory stage. It is an issue for the trial Judge to make a determination on after both parties have exhaustively canvassed the same.

The Defendants contend that the Plaintiffs have not established that the Defendants have been dispossessed of the portion of the suit property such that the plaintiffs can be adjudged to be in adverse possession. The Defendants argue that the plaintiffs are in possession with the express permission and consent of the Defendants and thus the possession cannot be adverse. In the case of **Sisto Wambugu – vs- Kamau Njuguna (Civil Appeal NO. 10 of 1982)** the court of appeal laid out the conditions to be satisfied in a claim for adverse possession and key among them is that the owner must be dispossessed of the land and the owner’s possession of the land must be discontinued. Whether or not the plaintiff’s in the present case dispossessed the Defendants and/or discontinued the Defendants possession for a period of over 12 years is matter of evidence which in my view can only be settled at the trial upon hearing the evidence. In support of the Defendants contention that the plaintiffs could not be adverse possessors having entered the land with the Defendants permission, the Defendants referred the court to the case of **JANET KANUTHU KIMAMO – VS- SYMON GATUTU KIMAMO (2004) e KLR** where Hon. Justice Okwengu (as she then was ) on the issue whether or not there was adverse possession referred to the case of **Benjamin K. Murima & others – vs- Gladys Njeri CA NO. 213 of 1996** (unreported) where the Appeal Judges held thus:-

**“one needs only to look at the position of the occupier and if it is found that his occupation is derived from the proprietor of the said land in the form of permission or agreement or grant, then such occupation is not adverse, but if it is not so derived, then it is adverse”.**

In the present suit the trial court shall be called upon to determine the issues whether in the circumstances of this case the defendants were dispossessed of the land and/or discontinued of possession. For good measure and so as not to prejudice any party at the trial I will not make a determination on the twin issues as that will be within the province of the trial court.

All I can state at this stage is that the plaintiffs suit raises substantial issues which if resolved in favour of the plaintiffs at the trial the plaintiff will be entitled to judgment but equally the Defendants have raised credible issues in their opposition and which if sustained a the trial will entitle the Defendants to Judgment.

Having regard to the totality of the facts and circumstances in this matter it is my view that the order that commends itself to the court in the interest of justice is that the parties be required to maintain the present

and the obtaining status quo so that the subject matters of the suit is preserved to await the hearing and determination of the suit.

I therefore order and direct that the parties maintain and observe the current status quo pending the hearing and determination of the suit. I further order and direct that the parties hereto facilitate the expeditious disposal of the suit and in that regard the parties are directed to complete full compliance with order 11 of the Civil Procedure Rules within the next 60 days from the date of this ruling where upon the suit will be fixed for pre trial directions at the instance of either party.

The costs of the application will be in the cause.

Ruling dated and delivered at Nairobi this 31<sup>ST</sup> day of...January2014.

**J. M. MUTUNGI**

**JUDGE**

**In presence of:**

.....**PLAINTIFFS**

..... **DEFENDANTS**