



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO.284 OF 2015 (O.S)**

**IN THE MATTER OF CLAIM FOR TITLE TO**

**LAND BY ADVERSE POSSESSION OVER L.R. NO. 7785/1442**

**BETWEEN**

**ARCHDIOCESE OF NAIROBI**

**REGISTERED TRUSTEES.....PLAINTIFF**

**AND**

**MURINGA COMPANY LIMITED.....DEFENDANT**

**JUDGEMENT**

1. The Archdiocese of Nairobi Registered Trustees seek to a declaration that they have acquired title by adverse possession to land reference number 7785/1442 (“the Suit Property”) through the Amended Originating Summons filed in court on 26/5/2017. They also seek to have the registration of Muringa Company Limited as proprietor of the Suit Property or any other persons deriving title from Muringa Company Limited, cancelled and the register rectified by the Land Registrar to reflect the Plaintiff as the owner of the Suit Property.

2. The Amended Originating Summons is supported by the Affidavit of Father George Mungai, the priest in charge of St. Francis Xavier Catholic Church. He deponed that the Plaintiff took possession of the Suit Property which measures approximately  $\frac{3}{4}$  of an acre which land had been set aside by Defendant for public services including the construction of a public school. He stated that after taking possession of the Suit Property the Plaintiff constructed a church and a nursery school on the Suit Property which serve the local community in Muringa area. He further stated that the Plaintiff has over the years undertaken improvements on the Suit Property and also put up a fence around the Suit Property and gate for security purposes. He averred that the Plaintiff’s occupation and use of the Suit Property has been physical, open, uninterrupted and without interference from the Defendant and that no person has ever questioned its occupation or ownership of the suit land.

3. On 7/6/2014, the Defendant through its Chairlady issued a notice to the Plaintiff that it wished to demolish the Plaintiff’s structures on the Suit Property. The Plaintiff claimed that it learnt that the Defendant had resolved to sell the Suit Property to a private developer. Based on the apprehension that the Defendant may dispose of the Suit Property, the Plaintiff filed this suit.

4. Joseph Kinuthia, one of the directors of the Defendant swore the Replying Affidavit in opposition to the Plaintiff’s claim. He maintained that the church requested the Defendant in 1991 to allow it to conduct two Sunday services every month in the Defendant’s nursery school on the Suit Property. He denied that the Plaintiff had taken possession of the suit land measuring  $\frac{3}{4}$  of an acre and maintained that the nursery school occupies less than  $\frac{3}{4}$  of an acre and the rest of the land is leased to John Gitau Njau. He also stated that the nursery school was leased to Jane Njeri Wanyoike in 1991 on a monthly rent of Kshs. 800/= until April 2016 when the Defendant was served with a court order. He further stated that there is a teacher’s house on the Suit Property which was leased to Daniel Kiarie at a monthly rent of Kshs. 1800/= until the time the Defendant was served with the court order.

5. He maintained that the Defendant constructed the nursery school way back in 1997 and the Plaintiff only extended, fenced and installed the gate with its authority. He averred that the Plaintiff’s occupation of the Suit Property was that of a licensee which in any event had been terminated by the notice dated 7/6/2014. He urged that the Plaintiff had failed to meet the threshold for acquisition of land through adverse possession.

6. Dominic Ngeru Kariuki gave evidence for the Plaintiff. He stated that he had been a resident of Muringa area since his childhood and was a parishioner at the Plaintiff’s parish. He was also the chairman of Muringa Residents Association. While growing up in Muringa area, he knew that St. Xavier Catholic Church occupied the suit land. He stated that the Sunday services or Mass is conducted in a hall which is used as a nursery school during weekdays and is also used as a public facility for meetings and social events by the residents. He stated that the

Parishioners made some developments on the suit land and constructed a better church to make it conducive for the Sunday prayers as the church grew. He stated that out of courtesy and in order to maintain good relations with the Defendant as its neighbour, the church wrote to the Defendant when it was carrying out the improvements. He maintained that they always knew that that was a public plot under the care of the church. He further stated that they had been worshiping in the place for about 40 years and had never heard anybody claim the land until 2014 when they learned that the Defendant had resolved to sell the Suit Property to a private developer.

7. He was apprehensive that if the Suit Property is left to the Defendant it will be disposed of for private use yet it was set aside for public use. He produced the survey plan for the area. He also produced a copy of the letter dated 13/6/1995 from the Director of City Planning and Architecture Nairobi City Council addressed to the Commissioner of Lands in relation to the subdivision of plot number 7785/8. The letter stated that the subdivision scheme had been approved subject to certain conditions. One of these conditions was that the land coloured red on the map for shops and public purposes would be surrendered to the government free of cost while the area of land indicated on the plan for the nursery school would be surrendered to the Nairobi City Council free of cost. He also produced a copy of the letter dated 20/11/1990 from the Director of City Planning and Architecture to the Commissioner of Lands which gave final approval for the subdivision of L.R. No. 7785/8 subject to the conditions being appended to the head title and all the plots for public purposes being formally surrendered to the government free of cost. He also produced photographs of the Suit Property showing the church altar and worshippers in the church during a service. He produced copies of the notice to demolish issued by Defendant on 7/6/2014 as well as the Defendant's advocate's notice to vacate issued to the Plaintiff on 18/3/2015.

8. He stated that he served the church in various capacities as a youth leader, choir master, secretary at some point and was in the development committee. He stated that they had a catechist house on the land and ran a self-help group. The catechist's house was built by the church. He stated that the church did not lease the nursery school to an outsider but had instead allowed a certain lady to use it since she cleans up the church. The church allowed an orphan by the name John to cultivate part of the land who does not pay the church any rent. He was present at the Defendant's Annual General Meeting in 2014 when a resolution was passed to sell the Suit Property for 28 million shillings. He denied that the Plaintiff was licensed by the Defendant's to occupy the Suit Property.

9. Peter Kimani Gitau who was born and resides at Muringa area also gave evidence. He stated that the nursery school was used for Sunday Services over the weekends and that there had been tremendous growth in the number of church members. A resolution was passed by the shareholders of the Defendant in its annual general meeting held in January 2014 that the Plaintiff's license would be terminated to enable the Defendant sell the Suit Property for Kshs. 28 million. He stated that the church had been on the land since 1977. He was born in 1962 and stated that he started going to Muringa in 1975. He stated that the nursery school was built around 1973 and that the church would use the nursery school for its worship purposes. He stressed that the church had never paid rent to the Defendant.

10. Father George Mungai gave evidence. He stated that the Plaintiff through its Parish known as St. Francis Xavier's Catholic Church took possession of the public space set aside by the Defendant for public purposes including the construction of a public school measuring approximately  $\frac{3}{4}$  of an acre. He stated that the Plaintiff constructed a church and a nursery school on the Suit Property which serves the community of Muringa area. The Plaintiff undertook improvements on the Suit Property and even secured it with a fence and a gate. He stated that the Plaintiffs occupation of the Suit Property has been physical, open, uninterrupted by the Defendant or any other person until the Defendant issued a notice in 2014. He stated that the church's occupation of the Suit Property has been consistent and other church activities are carried out on it. He confirmed that the church had renovated the structures on the land over time and that the church had control over the whole piece of land.

11. David Githiomi Manyara gave evidence for the defence. He stated that he is the current chairman and shareholder of the Defendant. He further stated that he was the Farm Manager of the Defendant from 1971 until 1991 when it resolved to subdivide L.R. No. 7785/8 and allocate the plots created to its shareholders. He stated that the Defendant constructed the nursery school in 1973. He further stated that the land closed on subdivision on or about 1981 after about 150 title deeds had been issued to the shareholders. He confirmed that during the subdivision of L.R. No. 7785/1442, which is the Suit Property, was set aside for nursery and primary school when the Defendant applied for approval from the Commissioner of Lands.

12. He stated that in 1991 the priest in charge requested to have St. Xavier Muringa Catholic Church allowed to conduct two Masses every month in the Defendant's nursery school while the other Sundays the worship would be conducted in Huruma. He stated that the request was granted and that remained the position and further, that the church extended the existing nursery school with the express permission of the Defendant.

13. He stated that the nursery school was leased to Jane Njeri Wanyoike in 1991 at a monthly rent of Kshs. 800/= until April 2016. He also stated that there was a teacher's house next to the nursery school which the Defendant leased to Daniel Kiarie who was paying Kshs. 1800/= per month and the remaining half acre was leased to John Gitau Njau at an annual rent of Kshs. 1200/=. He maintained that the Plaintiff partially occupied the suit land as a licensee and that as a sign of appreciation and giving back to society the Plaintiff fenced and installed a gate on the suit plot. He stated that the Defendant's shareholders resolved at the annual general meeting held on 19/1/2014 to terminate the Plaintiff's license so as to pave way for the Defendant to use the suit land as it deemed fit. He denied that the Plaintiff had been in actual, open, physical and uninterrupted possession of the Suit Property for over 30 years or that it could claim to have acquired title to the Suit Property by adverse possession.

14. He confirmed on cross-examination that the church had been on the suit land and that it did not pay any rent to the Defendant. He also confirmed that there was no license authorising the Plaintiff to be on the land. He stated that the development the Defendant wished to carry out on the land could be for commercial purposes or any other purpose the shareholders may decide. He denied that the Suit Property was public property and maintained that it belonged to the members of the Defendant.

15. Joseph Kinuthia, the Defendant's secretary gave evidence along the same lines as the Defendant's chairman. He confirmed that the Defendant did not enter into a lease agreement with the church. He also confirmed that they did not have receipts issued to the other people who the Defendant claimed were also using the suit land.

16. John Gitau Njau gave evidence for the defence. He stated that the Defendant leased to him  $\frac{1}{2}$  an acre of the Suit Property in 2010 at an

annual rent of Kshs. 1200/=. He stated that he has been practicing subsistence farming on the land. He stated that the remaining  $\frac{3}{4}$  an acre of land on which the nursery school stands was leased to Jane Njeri Wanyoike who was paying a monthly rent of Kshs. 800/=. He did not have the receipts the Defendant issued to him to confirm that he paid rent to the Defendant.

17. The Defendants produced copies of correspondence exchanged with the Plaintiff. The Plaintiff wrote to the Defendant on 15/3/2006 with regard to the church's expansion and renovation. In that letter, the Plaintiff mentioned that it wished to renovate the structure during the school holidays because of the nursery school and proposed to do this during April Holiday. The church also pointed out that due to the growth of its congregation it wished to expand the church structure. The Defendant responded to the letter on 22/7/2006 stating that it had no problem with the renovation and expansion on condition that it was indicated on the notice that it was renovation of Muringa nursery hall and asked the church to share the sketch plans with the Defendant. The Company also asked the church to use strong materials in reinforcing the gate. They wrote to the Defendant on 14/11/2006 requesting a meeting before construction started for the church expansion.

18. The Defendant produced a copy of the Plaintiff's letter dated 18/4/2011 notifying the Defendant that it wished to renovate the church by repairing the floor, fixing plywood on the side and planting flowers outside the church. It also produced a copy of the Plaintiff's letter dated 4/10/2013 in which the church stated that it had repaired the building and the toilet at its cost. The letter stated that the toilet being built by the church would be open for use by the larger community. The Plaintiff sought the Defendant's instructions so that it did not have to keep on referring to the Defendant. The site plan showing the expansion of the nursery school prepared by the Plaintiff was also produced in evidence together with a copy of the title for L.R. No. 7785/1442 issued to the Defendant for the suit land measuring 0.2809 ha in 2013. The Defendant also produced a copy of the letter of allotment issued to the Defendant by the Commissioner of Lands on 6/9/2012 reallocating it plot number 7785/8/2. The Defendant also produced a second letter of allotment for the same piece of land dated 22/6/2011 which indicated that the annual rent would be peppercorn together with the copy of the receipt evidencing payment of Kshs. 2,550/= demanded in the letter of allotment. The letter of allotment indicates that the land would be used for commercial purposes. The Defendant also produced a copy of a notice to vacate issued to the Plaintiff by its advocates G. K. Gatere on 18/3/2015.

19. The Defendant produced a copy of the letter dated 14/10/2010 addressed to the Commissioner of Lands vide which the Defendant sought to be reallocated the nursery school plot and the dam plot both of which resulted from the subdivision of L.R. No. 7785/8. The letter stated that these two subdivisions were planned for a nursery school and irrigation purposes and that the members wished to develop the nursery school for the benefit of the residents and that the dam had dried up. The letter urged the Commissioner of Lands to consider reallocating the plots to the Defendant.

20. The issue for determination is whether the court should grant the orders sought in the Amended Originating Summons. The court has looked at the written submissions of both the Plaintiff and the Defendant.

21. The Defendant submitted that for the Plaintiff to succeed in the case for adverse possession, he must demonstrate that he has occupied the land openly, without force, secret and without the permission of the owner. It relied on the case of **Kimani Ruchire v Swift Rutherfords and Company Limited [1980] eKLR** in urging that a Plaintiff must prove that the Defendant had actual or constructive knowledge of possession which was continuous that was not interrupted. It further relied on Sections 7, 13 and 17 of the Limitation of Actions Act on the prerequisites for adverse possession. The Defendant submitted that the Plaintiff had failed to show exactly when it entered the Defendant's land. The Defendant urged the court to disregard the evidence of the three witnesses who testified for the Plaintiff arguing that they had not been in the land in the 1970's or 1980's when the Plaintiff claims it entered the land.

22. The Defendant also relied on the correspondence exchanged with the Plaintiff regarding the renovation and the extension of the premises which the Plaintiff undertook on the suit premises to show that its permission was sought. The Defendant urged that it permitted the Plaintiff in 1984 to be conducting church activities in the suit premises on two Sundays every month and that having allowed the Plaintiff into the premises, the Plaintiff cannot claim to be entitled to adverse possession of the land. The Defendant did not lead any evidence to establish that it permitted the Plaintiff to use the premises for its church activities twice every month in 1984. The Defendant did not also adduce evidence to show that the nursery school still operated on the suit premises.

23. The letters exchanged on the extension and renovation of the premises by the Plaintiff with the Defendant's approval dated 15/3/2006, 22/7/2006 and 14/11/2006 confirm that by 2006, the Plaintiff had been in occupation of the Suit Property that is why it was extending and renovating the suit premises. The Defendant admitted that the Plaintiff had been conducting its church activities on the land from 1984 on two Sundays every month. This confirms that the Plaintiff had been on the land for more than twelve years before filing this suit in 2015.

24. The Defendant further submitted that the Plaintiff had not been in continuous use of the land and that it only used the premises twice a month and that the Defendant used the premises the rest of the month. The Defendant did not lead evidence to show what it used the premises for the rest of the month. It neither called Jane Njeri Wanyoike whom it claimed it had leased the nursery school to in 1991 to confirm this nor did it provide evidence that she used to pay monthly rent of Kshs. 800/= for the nursery up until April 2016. The church adduced evidence to show it has been using the suit premises for its services including photographs showing the church altar and the congregation during a church service. The Defendant failed to demonstrate that it was indeed using the land alongside the Plaintiff to show that the Plaintiff did not have exclusive use of the suit premises. The Defendant did not tender any evidence to show that indeed the other persons it claimed to have leased the suit land to paid it rent for the land.

25. It is necessary to delve into the nature of the Defendant's interest in the land in dispute. David Githiomi Manyara stated that when the Defendant resolved to subdivide L.R. No. 7785/8 and give the plots to its shareholders, the Suit Property was set aside for nursery and primary school when the Defendant applied for approval from the Commissioner of Lands. Individual titles were issued to the Defendant's shareholders for their land leaving the suit land for public purposes.

26. From the evidence led and the correspondence exchanged between the Defendant, the Director of City Planning and Architecture of Nairobi City Council and the Commissioner of Lands on the subdivision of L.R. number 7785/8 which belonged to the Defendant, the Suit Property was surrendered for public purposes at the time the Defendant subdivided its land and gave it to its shareholders. The Suit Property was left for public purposes, this being one of the conditions for the grant of final approval for subdivision of the Defendant's land.

27. Looking at the letters of allotment dated on 6/9/2012 and 22/6/2011 following the Defendant's application to the Commissioner of Lands to be reallocated plot number 7785/8/2 and the title issued to the Defendant in 2013 over the Suit Property, it is clear that the Defendant surrendered the suit land for public purposes at the time it subdivided L.R. number 7785/8 for allocation to its members. The Defendant applied to be re- allocated the same piece of land in 2010 when it wrote to the Commissioner of Lands stating that its members wished to develop the nursery school for the benefit of the residents. The minutes for its meeting of 19/12/2014 show that that is when it resolved to notify the Plaintiff to move out so that it could use the land for development. The title issued to the Defendant following its application for reallocation of the suit land indicates that the land is to be used for commercial purposes. The Defendant gave notice to the Plaintiff to move out of the land on 18/3/2015.

28. After evaluating the evidence adduced, the court finds that the Plaintiff has established on a balance of probabilities that it has been in possession of the Suit Property continuously for more than twelve years without force and without interruption and has therefore acquired title to the Suit Property by adverse possession.

29. The court directs the Land Registrar to rectify the register by cancelling the registration of the Defendant as the proprietor of the Suit Property and to enter the name of the Plaintiff as the proprietor of the land. The Plaintiff is awarded the costs of the suit.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of May 2019**

**K.BOR**

**JUDGE**

**In the presence of:-**

Ms. D. Nakato holding brief for Mrs. Koech for the Plaintiff

Ms. G. Mathia holding brief for Mr. Gatere for the Defendant

Mr. V. Owuor- Court Assistant