



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 256 OF 2017**

**(Formerly Nairobi HCCC No. 965 of 2004)**

**DAVID MUNGAI**

**JOSEPH GITU**

**PETER GATIMU**

**PATRICK NDUNGU**

**ELIJAH THUO**

**BARNABAS MENGICH (Suing as the Registered**

**Trustees of APOSTOLIC FAITH CHURCH.....PLAINTIFF**

**VERSUS**

**JANE NYAMBURA JOSHUA.....DEFENDANT**

**JUDGEMENT**

By a Plaint dated 25<sup>th</sup> August, 2004 and filed on 15<sup>th</sup> September, 2004, the Plaintiff prays for:

- i. An order for the eviction of the Defendant from those premises known as NGONG/ NGONG/ 406;
- ii. An order restraining the Defendant from entering into or otherwise interfering with the Plaintiff's quiet enjoyment of the suit premises;
- iii. Mesne profits and general damages;
- iv. Costs and interest of the suit.

The Defendant filed her Statement of Defence including a Counterclaim dated the 19<sup>th</sup> October, 2004 where she contended that she has been occupation of the suit land with knowledge of the Plaintiff and without use of force as she was allowed to occupy a portion of 180ft by 300 ft by the Plaintiff. She admits being the widow of the late Joshua Kiarie, a founder of the Apostolic Faith Church. She further admits occupying a portion of the suit land but denies committing any acts despite warnings as alleged. She insists the Civil Suit was struck out on technicality. She lodged a Counterclaim where she prayed that the Plaintiff's suit be dismissed with costs and Judgement be entered against it, for the following reliefs:

1. A declaration that the Defendant has acquired ownership of the said portion of land by adverse possession.
2. In the alternative to the above a declaration that the Defendant has acquired ownership of the said portion of land by irrevocable agreement or gift.
3. An order compelling the Plaintiff to subdivide and transfer the said portion of land to the Defendant.

#### 4. Costs of the Defence and Counterclaim.

The Plaintiff filed a Reply to Defence and Counterclaim dated the 3<sup>rd</sup> November, 2004 where it reiterates its claim as per the Plaintiff and contends that the Defendant is not entitled to orders of adverse possession. It avers that they had always challenged the Defendant's illegal occupation of church property. It insists that the Defendant has no basis for the claim over the land in issue. It states that the contentions in paragraph 9 to 11 of the Counterclaim are untrue and premised on a misapprehension of fact and law. It explains that HCCC No. 2807 of 1980 was not a suit between the parties herein and the same abated one-year after the death of the Defendant therein.

The matter proceeded to hearing where the Plaintiff called two witnesses while the Defendant only had one witness.

#### **Evidence of the Plaintiff**

The Plaintiff is the registered proprietor of land parcel number NGONG/ NGONG/ 406 hereinafter referred to as the 'suit land'. The Plaintiff contends that they had allocated a house in a portion of the suit land to the Defendant's husband Pastor Kiarie who was their founder member to reside thereon upon his retirement. After the Defendant's husband demise, the Plaintiff allowed her to continue to reside on the house situated in a portion of the suit land but later she commenced encroaching on an extra portion without their permission and despite their warning she persisted in doing so. She further put up rental houses as well as a storeyed building thereon without the Plaintiff's consent. Efforts to have the matter resolved amicably failed as the Defendant declined to take the ¼ acre offered to her but instead demanded for a larger portion. The Plaintiff was forced to fence off part of the land due to the challenges faced from the Defendant's tenants, as there were incidences of theft of church property as well as dumping of rubbish on the suit land. Further, it was also a security risk. The Plaintiff wants the Defendant to be restrained from interfering with the suit land. The Plaintiff produced the Certificate of Lease dated 27<sup>th</sup> October, 1982, Agreement with the Defendant dated 5<sup>th</sup> January, 1992 and various correspondence in respect of suit land as exhibits.

#### **Evidence of the Defendant**

The Defendant is the widow of the founder member to the Plaintiff. She claims that her husband was allocated the suit land in 1958 by the defunct Ol Kejuado County Council for and on behalf of the Plaintiff. She claims the husband built the Church on the suit land which building was completed in 1961. Further, that her husband also built a family house on the suit land. It was her testimony that in 1975 the husband changed the name of the Church to Holy Church and moved to Kangundo with the Church House remaining vacant. DW1 averred that her husband allowed the Plaintiff to use the Church and they promised not to interfere with the portion of the plot where they occupied. She confirmed that her husband died on 25<sup>th</sup> December, 1985 and in the following year the Plaintiff's gave her one and half months to vacate the suit land but elders intervened and the Church was ordered to curbe a portion where she resides as agreed between the plaintiff and her late husband. She stated that the Church intimated that they would allow her to occupy a smaller portion of the land than had been agreed upon. DW1 explained that she resided on the suit land from 1963 and bore all her children thereon. Further, that she currently resides on the suit land with all her children and grandchildren. She stated that she put up rental houses thereon which currently has tenants. She rejected the portion offered by the Plaintiff, as it is much smaller than the section she occupies. She insisted she has acquired the portion she occupies through adverse possession. Further, that the local administration including the elders advised the Plaintiff to subdivide and allocate her the portion she occupies but it declined. She produced various correspondence including pleadings filed in previous suits and agreement dated 5<sup>th</sup> January, 1992 to buttress her arguments.

The parties filed their respective submissions that I have considered.

#### **Analysis and Determination**

Upon consideration of the Pleadings filed herein, including witness testimonies, exhibits and submissions, the following are the issues for consideration:

- Whether the Plaintiff is entitled to the orders sought in the Plaintiff.
- Whether the Defendant is entitled to the orders sought in the Counterclaim.
- Who should bear the costs of the suit.

As to whether the Plaintiff is entitled to the orders sought in the Plaintiff. The Plaintiff has sought for orders of eviction of the Defendant from the suit land; an order restraining the Defendant from entering into or otherwise interfering with the Plaintiff's quiet enjoyment of the land; Mesne profits and general damages. It was the Plaintiff's contention that it is the proprietor of the suit land as evidenced by the Certificate of Lease dated 27<sup>th</sup> October, 1982 which was produced as an exhibit. PW1 admitted that they had allocated the Defendant's husband who was their founding pastor a house and a portion of the suit land parallel to the house to use upon his retirement. Further, that upon the Defendant's husband's demise, they allowed the Defendant to occupy a portion of the suit as per the previous terms they had with the deceased. The Defendant as DW1 averred that the Plaintiff had secretly obtained registration of the suit land in its name yet the same had been allocated to the husband by the Ol Kejuado County Council in 1958. The Plaintiff's witnesses contended that the Defendant proceeded to construct a storeyed building and rental houses without their permission and encroached on an extra space despite their protest. Further, that the Defendant has refused to accept the ¼ acre of land they offered her and demanded for more. According to the letter dated the 11<sup>th</sup> January, 1978 at Clause (b) the Executive Committee of the Plaintiff recommended that: ' **in recognition of his services to the church, the Executive Committee of the Apostolic Faith Church, has recommended that Pastor Joshua W. Kiarie should continue to live in his present house on the church compound, and use the piece of land parallel to his house during retirement.**' In another letter dated 20<sup>th</sup> March, 1978, the said Rev Joshua Kiarie wrote to the Registrar of Societies and I have quoted paragraph 4 of the said letter where he stated as follows: ' **I Joshua W. Kiarie, who once contested the right of ownership of plot No. 406 in Ngong Township, now declare that as a**

result of our latest agreement, the Holy Church has now handed over that plot and all the facilities on it to the ownership and management of the Apostolic Faith Church. Consequently, I am informing the Evangelical Free Mission, Ngong Branch, Reg. No. 7398 to vacate the premises and look for alternative accommodation elsewhere for their members because the Apostolic Faith Church want to utilize the premises for the convenience of their members as soon as possible. ‘

From this excerpt, it is evident that the Defendant’s husband did not claim the suit land as averred by DW1 that the Plaintiff secretly registered the same in its name. Further, it is clear that the deceased handed over suit land to the Plaintiff. DW1 claimed the Plaintiff had given her notice to vacate suit land in 1986 after the husband’s demise and she reported to the DO and elders who intervened on her behalf. As per an agreement dated the 5<sup>th</sup> January, 1992 between the Plaintiff and the Defendant which was done after Defendant’s husband’s demise, it referred to the letter dated the 11<sup>th</sup> January, 1978, where parties therein agreed as follows;’ **After handling the above case with the presence of the panel of Elders, the case was that the wife of the late JOSHUA W. KIARIE have the right to stay on her shamba according to letter dated 11<sup>th</sup> January, 1978 which was written by the Church Executive before Mr. JOSHUA died which they recommend that his wife should continue to live in his present house on the church compound and use the piece of land parallel to his house during his retirement. It has further been agreed that Pastor JOSHUA W. KIARIE shall never interfere with the affairs of the church on Plot No. 406 Ngong Township just as the church should never interfere with the section allocated to him on the said plot. ‘**

From the said agreement, it is evident that the Defendant who was the complainant duly signed it. Further, it clearly indicated that the Defendant was to occupy the house in the compound and use land parallel to it. There was no indication of the measurement of the portion to be occupied nor the period of occupation. Further, there was also no indication that the Defendant was to construct thereon. Each party agreed not to interfere with the other parties occupation. From the Defendant’s averments, she claims being entitled to 180 ft by 300ft of the suit land but I note from the various correspondence produced by both parties as exhibits, there was no indication on the measurement of portion she was to occupy. Further, DW1 never furnished Court with a Surveyor’s report to confirm the said measurements. The Plaintiff’s witnesses confirmed in court that they offered the Defendant ¼ acre of the suit land but she declined and demanded for more. From the letter dated the 25<sup>th</sup> September 1991, addressed to the Clerk OI Kejuado County Council, the Plaintiff agreed to give a small piece of land to the Defendant and sought for subdivision of the same. I note from the correspondence there was no permission granted to the Defendant to expand the portion she occupies by constructing rental houses as well as a storeyed building thereon. In the case of **KAMAU MUCHUA Vs RIPPLES LIMITED CA CIVIL APPEAL NO. 106 of 1992**, the Court of Appeal states as follows: ‘ **A party as far as possible ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act.**’

To my mind, it seems the Defendant became the proverbial Arab and the Camel, where the Camel extended its occupancy to the extent that it now demanded the whole tent. Based on my analysis above and based on the court of appeal decision, I find that the Defendant cannot dictate the portion she was to be allocated but it is upon the Plaintiff to determine it. In the circumstances, I find the Plaintiff is indeed entitled to restrain the Defendant from interfering with suit land. On the issue of eviction orders sought by the Plaintiff, it submitted that it was entitled to vacant possession. It relied on the **Wamwea V Catholic Diocese of Muranga Registered Trustees (2003) KLR 389** to support its argument for vacant possession. I am of the opinion that since the Plaintiff offered a portion of the land to the Defendant vide the Agreement dated the 5<sup>th</sup> January, 1992 but now seeks her to move therefrom, as a Court I cannot interpret an Agreement for the parties herein on when the Agreement was to be rescinded. I hence hold that the plaintiffs’ are entitled to the orders of vacant possession as sought. On the issue of mesne profits and damages sought, the Plaintiff never adduced evidence to that effect and since the Defendant resided on the suit land with its permission, I am unable to grant the said orders.

As to whether the Defendant is entitled to the orders sought in the Counterclaim. The Defendant sought for a declaration that she had acquired ownership of the said portion of suit land she occupies by adverse possession; or in the alternative that she had acquired ownership of the said portion of land by irrevocable agreement or gift; and sought for an order compelling the Plaintiff to subdivide and transfer the said portion of land to her. The Defendant adduced evidence that she had resided on the portion of suit land prior to her husband’s demise and continued to reside thereon openly. She contended that she has constructed rental premises and she resides thereon with her children and grandchildren. In her submissions she claimed she had acquired the land by adverse possession and relied on sections 7, 13 and 17 of the Limitation of Actions Act as well as the following cases: **Robert Otieno Agok V Paskal Oor ( 2019) eKLR; Mtana Lewa V Kahindi Ngala Mwangandi ( 2015) eKLR; Ramco Investments Limited V Drive In Theatre Limited (2014) eKLR; Titus Mutuku Kasuve V Mwaani Investment Ltd & 4 Others (2004) eKLR and Samuel Katana Nzunga & 102 Others Vs Salim Abdalla Bakshwein & Another(2013) eKLR** to support her arguments. The Plaintiff opposed the Defendant’s claim for adverse possession and relied on the cases of: **Mtana Lewa V Kahindi Ngala Mwangandi (2015) eKLR; Samuel Miki Waweru V Jane Njeri Richu CA No. 122 of 2011 (UR) and Kweyu V Omutut (1990) KLR 709** to buttress their arguments.

Adverse possession is governed by Section 38 (1) and (2) of the Limitation of the Actions Act that provides as follows:

**(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in [section 37](#) of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.**

**(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.**

The requirements to fulfill a claim for adverse possession were well articulated in the case of **Wambugu V Njuguna (1983) KLR 173** where the Court of Appeal stated that: ‘ **Adverse possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of Adverse Possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.**’

Judge Angote in the case of **Haro Yonda Juaje V Sadaka Dzenzo Mbauro & Another (2014) eKLR** aptly outlined the ingredients of

adverse possession and summarized them as thus:’ **a) That one has made physical entry on the land and is in actual possession of the land for the statutory period; b) That the said occupation is non permissive; c) That the occupant has the clear intention of excluding the owner from the property (*animus possidendi*) ; d) The acts done by the claimant are inconsistent with the owners enjoyment of the land for the purpose which he intended to use it; and e) that the possession was continuous, uninterrupted and unbroken for the statutory period.’**

From the evidence, before court even though the Defendant had resided on the land with her husband but vide an agreement dated 5<sup>th</sup> January, 1992, the Plaintiff allowed her to occupy a portion of the said land where she had resided on. She had claimed in her submissions that the Plaintiff’s right over the suit land had extinguished in 1970 as they had been residing thereon from 1958. However, this is contrary to her averment in the witness statement that she was married to the husband in 1963 when she commenced residing on the suit land.

In the case of **Wines & Spirits Kenya Limited & another v George Mwachiru Mwango [2018] eKLR**, the Court of Appeal held that:’ **The law is clear on when time starts running for purposes of adverse possession. The possession or occupation must be with the knowledge of the registered owner (See Kimani Ruchine & Another vs. Swift Rutherford & Co. Ltd (1980) supra. Time cannot therefore start running until the registered owner becomes aware that there is a trespasser occupying his/her property and does nothing to assert his rights on the property for at least 12 years. That being so, time in this case only started running in 2012. Immediately thereafter, the appellants had the respondent evicted from the suit premises. Even as at the time they filed their claim before the High Court, they had already been evicted. It was evident therefore that the respondent was not in actual possession for over 12 years as alleged.’**

In relying on this Court of Appeal decision, I note that the Certificate of Lease was issued to the Plaintiff on 27<sup>th</sup> October, 1982 and it is trite law that in a claim for adverse possession, time only starts to run when the owner of the land is registered and not otherwise. I hence beg to differ with the Defendant on the point that time began to run in 1958 when the land had been allocated to her husband who commenced residing thereon. Further, I note from the Defendant’s testimony she confirmed that the house on the suit land was vacant from 1975 upto 1978 when the husband had changed the name of the Church and moved to Kangundo hence she cannot turn around and claim that she had continued to reside thereon from 1958 to date. From the excerpts, I cited above, it is evident that the Defendant was granted permission by the Plaintiff to occupy a portion of their land but opted to stretch her boundaries. Further, she was offered ¼ an acre of land which she declined. I note the Defendant had filed Nairobi HCCC NO. 2824 of 1997 against the Plaintiff seeking orders of adverse possession which suit was struck out in May 2004. From the evidence before me, I find that time could not have begun to run in 1992 as she was granted permission to occupy the house on suit land. Further, in 1997 she instituted a suit for adverse possession and this in essence means time could not have begun to run in 1997. For occupancy to be deemed adverse, there has to be hostile takeover of the owners land after which the occupation has to be open, notorious and uninterrupted for a period of 12years. Further, the entry into the land has to be without the permission of its owner. However, in this instant case, the Defendant was actually granted permission on 5<sup>th</sup> January, 1992 to occupy the house on suit land while the husband had also been granted permission in 1978 to reside thereon. In both instances, the entry of the Defendant or her deceased husband on the land was with permission from the Plaintiff and not contrary as claimed by the Defendant. The Plaintiff also allowed them to farm a parallel portion next to the Church house they occupied. From the evidence before Court, it was not clear on when she put up the storeyed building nor the rental premises on the suit land. However in an affidavit sworn by the Defendant on 22<sup>nd</sup> September, 1999 and filed in Nairobi HCCC No 2824 of 1997 which pleadings were produced as an exhibit, she had confirmed that the suit land measures 4 acres and contended that she had been using 2 acres but at paragraph 14 of the said affidavit, she admitted that the Plaintiff herein indeed occupied a larger portion of the said land. She denied bringing in building materials as well as intending to build thereon on but averred that she had put up a temporary shed to run a timber business. In her testimony DW1 claimed to have obtained an order to build on suit land but did not produce the same in court. She further did not confirm whether she had put up a storeyed building as claimed by the Plaintiff’s witnesses. From the Defendant’s averments, I denote an element of dishonesty as it seems she commenced putting up the building after the commencement of this suit, which was after September 2004 when time had stopped running in her claim for adverse possession as there was a pending suit in Court.

Based on my analysis above, I find that the Defendant has failed to discharge her burden of proof in her claim for adverse possession. I hold that since she lodged a suit for adverse possession in 1997, time did not begin to run until 2004 when the suit was struck out. However in 2004, this suit was filed and 12 years had not lapsed. Since the Church has continued to operate on the suit land, the Defendant has not proved that it dispossessed the Plaintiff of the suit land during the statutory period. She insists she has been peacefully occupying the land but to my mind, the mere existence of the various suits which pleadings were produced in Court and intervention from the elders including provincial administration for the plaintiff not to evict her, it was already a clear indicator that the Defendant’s occupation on the suit land was not peaceful as claimed.

As for the alternative prayer in the counterclaim where the Defendant has sought for the portion of the land she occupies to be given to her and subdivision undertaken to that effect. From the evidence above, it emerged that the Plaintiff’s had offered her ¼ acre which she declined. In all the correspondence produced in court as well as the agreement dated 5<sup>th</sup> January, 1992, there is no indication of the size of land she was to get from the suit land. Further, there was no indication in the said agreement on when she was to vacate the land, as a court I cannot interpret an Agreement for parties. Since she declined the offer for ¼ acre of the land, I cannot compel the Plaintiff’s to give her a portion as it did not state in court whether the said offer still stands. In the circumstance, I find that the Defendant has not proved her claim in the Counterclaim, which I proceed to dismiss.

On the issue of costs, I find that since the Plaintiff is the successful party, I will award it the costs of the suit.

It is against the foregoing that I find that the Plaintiff has proved its case on a balance of probability and will proceed to make the following orders:

1. The Defendant be and is hereby directed to grant vacant possession of the portion of the land she occupies on NGONG/ NGONG/ 406 within 90 days from the date hereof failure of which the Plaintiff will be at liberty to evict her therefrom.
2. The Defendant, her agents and servants be and is hereby restrained from entering into or otherwise interfering with the Plaintiff’s

quiet enjoyment of land parcel number NGONG/ NGONG/ 406 after the period of 90 days.

3. The costs of the suit is awarded to the Plaintiff

**Dated signed and delivered in open court at Kajiado this 23<sup>rd</sup> day of October, 2019**

**CHRISTINE OCHIENG**

**JUDGE**

**IN THE PRESENCE OF:**

Gichamba for plaintiff

Khalalwe for Kigano for defendant

Court assistant- Mpoye