



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT CHUKA**

**CHUKA ELC CASE NO. 102 OF 2017**

**FORMERLY MERU ELC. 33 OF 2008 (OS)**

**THE PRESBYTERIAN FOUNDATION.....APPLICANT**

**VERSUS**

**GENERAL OF THE SALVATION ARMY.....RESPONDENT**

**JUDGMENT**

**BACKGROUND**

1. This is a case in which the Applicant seeks an order that it be registered as the sole proprietor of the land known as L.R. No MWIMBI/S. MUGUMANGO/3 measuring 4.65 Ha. The claim is one of adverse possession.

**THE APPLICANT'S CASE**

2. The Applicant on 17/3/2008 filed an O.S. dated the 22<sup>nd</sup> of February 2008 seeking the determination of: (quote)

a) Whether the Applicant has been in exclusive and uninterrupted possession of all that parcel of land, measuring about 4.65HA, registered under the Registered Land Act, cap 300 of the Laws of Kenya, and comprised in the title number LR No. MWIMBI/S.MUGUMANGO/3.

b) A declaration whether the Applicant has acquired and/or become entitled by adverse possession for over 12 years to all that parcel of land registered under the RLA Cap 300 of the Laws of Kenya and comprised in the title number LR. No. MWIMBI/S.MUGUMANGO/3.

c) An order that the Applicant herein be registered as the sole proprietor of the said land parcel number LR. No. MWIMBI/S.MUGUMANGO/3 registered in the name of the above named Respondent.

3. The OS is supported by the affidavit of Wilson W. Kiboi sworn on 22<sup>nd</sup> February 2008. The affidavit states as follows;

**1.The** deponent is the Secretary to the Applicant which has been in exclusive and uninterrupted possession of the suit property since 1954 or thereabouts.

**2.Sometime** in the year 1970 or thereabouts, the suit property was registered in the name of Meru County Council and reserved for Kiamaogo Full Primary School which is situated within the land.

**3.Sometime** in 1997, the Applicant sought to have the documents of title for the suit land changed to read "PCEA Kiamaogo Primary School" from the previous "Kiamaogo Full Primary School". The Applicant also sought to further improve on the land by constructing a secondary school.

**4.The** said secondary school was approved by the Ministry of Education, Science and Technology on 28/11/2005.

**5.The** suit land and all fittings and fixtures have been and are still under the exclusive possession, control and management of the Applicant herein which Applicant has been on the suit property for over 12 years.

**6.No** person has ever claimed the suit property and neither has the Respondent sought to evict or disturb the Appellant's enjoyment of the property and the Applicant has acquired title over the suit land by adverse possession.

4. The Applicant's exhibits include a green card showing the land to be owned by Meru County Council as of 18/11/1970 and reserved for Kiamaogo Full primary School. They also filed a letter dated 13/8/1997 which was a request for the town clerk to clarify that the school and land is owned and/or reserved for PCEA. There is also exhibited a request to register a secondary school and acceptance of the said request. They also exhibited a Title Deed issued on 30<sup>th</sup> October 2002 showing the Respondent to be the registered owner jointly with the County Council of Meru South. The Applicants filed a witness statement by Samuel Njoroge Waweru dated 14/9/2012 who seemed to have replaced the previous Secretary. The content is precisely the same as the previous affidavit, save for the change of name. They filed another witness statement on 16/4/2018 by Festus Nkonge M'Nairobi which contains the same averments as the other two statements on record.

5. The Applicants filed a bundle of documents on the 27<sup>th</sup> of April 2018. The same show that the Applicant's Kiamago Church has another parcel number 18 registered to it. (page 66 Applicant's documents). They also attached minutes of a Committee meeting approving change of name of the school to include the Church. The Applicants also annexed a defence from a different suit, HCC 422/1994 at Meru High Court which was between officers of the Salvation Army and the Meru County Council. They also filed a letter dated 1/8/1997 (page 57) which shows the Respondent was aware and involved in the goings on at the school. There is also a letter on page 54 authored by the Respondent on 6/2/1995 to the effect that the school belongs to the Salvation Army church and has been under management of the Applicant who should be forced to withdraw. The said letter is addressed to the High Court at Meru. There are also minutes of Meru Education Board meetings which show the Applicant as the manager of the school.

### **THE RESPONDENT'S CASE**

6. The Respondents filed a Replying Affidavit on the 23<sup>rd</sup> of June 2016. The same was sworn on 13<sup>th</sup> June 2016 by one Lieutenant Colonel John Kumar. His affidavit deposed as follows,

**1.He** is the Respondent's Secretary for Business Administration.

**2.He** has been advised that the suit is incompetent for several reasons i.e. as the Applicant has failed to enjoin the County Council of Meru to the suit, because the primary school mentioned is a government institution registered under the Education Act capable of suing through its Board of Management, because the Applicant is a society/trust not capable of suing in its own name, because adverse possession cannot be sought against the government and the County Council of Meru is the head lessee of the property and because the school itself is a government institution and cannot be in adverse possession of government land.

**3.The** institution purportedly in adverse possession of the suit property was registered in 2006 while the Respondent was registered as proprietor in 2002 and does not satisfy the 12 year rule even if other claims were to be sustained.

**4.The** school occupies a small portion of the property and in any case, cannot lay claim to the entire suit property.

7. They state that the suit is bad in law and misconceived. The Respondents have annexed a surveyor's report as well as pictures of the area showing the entire portion of land as compared to the school. They also annexed a certificate of official search dated 18<sup>th</sup> May 2016 showing the Respondent to be the proprietor and the County Council of Meru South.

The Respondent filed another witness statement on the 27<sup>th</sup> of June 2018 by Major Samson Mwangi, the contents being the same as the previous affidavits by the Respondent.

### **WITNESS EVIDENCE FOR THE APPLICANT**

8. The Plaintiff called one witness.

9. PW1 was Festus Nkonge M'Nairobi. He testified that he is a retired administrator at the Chogoria Mission Hospital. The Presbyterian Foundation was set up by the Presbyterian Church to oversee all the properties of the Church such as land and projects within the regions. They are the custodians of the church property. The current dispute is that the school land for Kiamaogo Primary School was reserved for Kiamaogo PCEA, but a title was issued to the Salvation Army trustees in 2002. Before that, the Board of the primary school had applied for a Title deed for the same which was deferred by the then County Council. The witness adopted his witness statement dated 13/4/2018 and produced the previous witness statements and documents as exhibits. The witness proceeded to state that the Applicant has been running the school from the fifties. The Respondent had a piece of land in the area about an acre whereupon they built their church. The remaining land remained with the PCEA church. There were disagreements in the community which were presided over by the DEO's office which was to solve the issue of who was the sponsor of the school. The minutes provided to the Court confirm that the Applicant was determined to be the sponsor of the school. The Applicant also sponsors a secondary school on the property. He said that in recent times, the Respondent's agents brought surveyors and policemen to the property. The Church requests that the title document given to the Respondent be declared void and that a title deed be issued to PCEA church so that the schools can continue with their activities undisturbed.

10. In cross-exam, the witness stated that the Applicant is a foundation established under the general assembly to oversee properties. It is a registered body though the witness did not have any registration documents. He testified that District Education Boards at Meru and Chuka resolved that sponsorship should be under PCEA. The witness stated that management of the school includes management of land. The secondary school was approved in 2006. The BOM is not enjoined. The church oversees the land but allows the BOM to run the school. The Respondent's title was obtained in 2002. The land was reserved for the primary school which was under the Applicant's sponsorship. All the schools are on public land. The Salvation Army church has 1 acre whose ownership they had requested.

In re-exam, the witness stated that the church provides 3 members to the BOM of the school. The chairman comes from the sponsoring church as per the Education Act. The County council deferred the church's application for a title deed. The parcel in question has only the primary and secondary schools. The Salvation Army church is on the border outside the suit land.

#### **WITNESS EVIDENCE FOR THE RESPONDENT**

11. The Respondent called one witness.

12. DW1 was Major Samson Mwangi who stated that he is a church minister with the Salvation Army. He adopted his witness statement dated 27/4/2018. He also produced the survey report dated 20/5/2016 filed by the Respondent and prayed that the Applicant's suit be dismissed with costs to the respondent.

13. In cross-exam, he stated, he had worked for the Salvation Army for 27 years and has been stationed at the suit premises for 3 and a half years. The land has the two schools as mentioned. The respondent's church is adjacent to the school. The respondent owns the property but does not occupy it. He did not know when the school came into existence but conceded that it was more than 12 years old. Reference was made to the search dated 7/10/2002 which states the respondent is proprietor. The respondent did not buy the land but was given by the government. The school was registered in 2000. He does not know the date on the title deed. The search indicates 2001 when title was issued. The schools were put up by the government of Kenya, specifically the Ministry of Education, through the community. He said the schools are built on the respondent's land and they belong to the respondent. There was a request by one Brigadier Woods giving up the land but no legal process took place. The respondent has never tried to evict the schools. The issue is on ownership and not occupation.

14. In re-exam, the respondent told the court that the land was registered to Meru County Council on 18/11/70 and reserved for Kiamaogo Primary School.

#### **WRITTEN SUBMISSIONS BY THE APPLICANT**

15. The Applicant's submissions were filed on 16/10/18. They give a background on the prayers sought in the O.S. as well as a background of the Respondent's case. They state that it is not in dispute that the Applicant took charge of running the primary school in issue in the 1960s and that the Respondent abandoned its agenda on running the school. It is also not disputed that the Ministry of Education and the DEB granted the Applicant church the right to run and manage the school occupying the said parcel and therefore the church has been present in the land for more than 12 years while the respondent has never stopped its developments. The circumstances in which the title deed was issued to the respondent remain unclear. They refer to several cases citing the ingredients for adverse possession and submit that they have proven their case. On the issue of failure to enjoin the County Government of Meru, the Applicant puts forward two arguments. Firstly, that the County Council no longer exists and cannot be enjoined. Secondly, the government is head lessor and all land is vested in the government and its inclusion or lack thereof on the title document has no effect in law. They pray that the OS be allowed with costs.

#### **WRITTEN SUBMISSIONS BY THE RESPONDENT**

16. The Respondent's submissions were filed on 16/10/2018. They give a brief background on the suit. They state that the suit is incompetent as the property the Applicant seeks to claim is government land which the Respondent holds in trust to safeguard community interests. They also state that the failure to enjoin Meru County Council or the latter authorities is fatal and shows the Applicant wishes to conceal information from the court. They also submit that the Applicant is not the BOM of the Kiamaogo Primary School and have no locus to bring this suit as they are merely a sponsor of the school. The Respondent also submits that the Applicant lacks the personality to file suit as a foundation and could only have approached the court through its body of trustees. Lastly they submit that the Applicant has not met the threshold of proving adverse possession as by the time of filing suit, the respondent had only been on the title deed for 6 years. They say the suit is bad in law and ought to be dismissed.

#### **ISSUES FOR DETERMINATION**

##### **17. Issue 1: Does the Applicant have locus standi to bring this action?**

It has been stated by the Respondent and even by the Applicant's witness, that the school on the suit property is a government school and the same has not been disputed by the Applicant.

Under the Basic Education Act No. 14 of 2013, section 55 creates the Board of Management for all public schools. Further in the Fourth Schedule to the Act, rule 1 is specific to the effect that the BOM shall be a body corporate capable of suing and being sued. Section 43(1) of the Act states that public schools include sponsored schools. Therefore this is a public school and the BOM should sue on its behalf if it was to claim the land it sits on.

On locus standi, in **STEPHEN KOECH & 4 OTHERS V ISAIAH YEGO [2000] EKLR HCC 22 OF 2000 ELDORET** Nambuye J. stated,

**“As regards the right to litigate on behalf of the community which donated the land, section 61 of the CPA comes into play. Such a claim would amount to a claim in the public interest and for one to litigate on behalf of the public one has to obtain the mandate of the many members of the public to litigate on their behalf and 2ndly seek authority from the Attorney General to file such proceedings. There is no such authority or permission from the local community which is exhibited, neither is there authority from the Attorney General or the Court to validate the proceedings.**

**If the community is aggrieved by this action and they feel convinced that they should dictate the destiny of the use of the said**

properties then they have to bring themselves within the law, go back to the adjudication records or the records of existing rights made during the registration, establish the nature and the terms of the trust or donation of the land. If they go contrary to absolute proprietorship then move the Court to have these terms and conditions reflected either on the title or in the register. Before that is established the community has no interest to protect in so far as change of user is concerned so long as the purpose for which the land was set aside namely education and the children of the community are not being denied education has not been abolished or compromised.”

18. It is indeed stated by the parties that the suit property has a school, Kiamaogo Full Primary School on the premises. The Applicant seeks to claim the suit property but in essence, the Applicant has only been playing a managerial role for the school. The Applicant herein seems to hold no semblance to any right of ownership to the property as it is not listed on any document emanating from the Ministry of Lands. Additionally, it is really not the Applicant itself that has been in possession and use of the property, parcel No. Mwimbi/S. Mugumango/3. It is actually the school that has been in open occupation and use of the property, pursuant to a grant by the Council. Therefore, if there was anybody that may have been capable of claiming adverse possession or any other injustice, it would have been the school itself.

19. I find that on this ground alone, the suit fails as the issue of locus standi is not a technicality to be bypassed in the spirit of the Constitution of Kenya 2010.

### **Issue 2: Is the suit property public land?**

20. In **CIVIL APPEAL NO 134 OF 1993 COURT OF APPEAL KISUMU OMOLLO, AKIWUMI AND TUNOI JJA - ELIUD NYONGESA LUSENAKA & ANOTHER V NATHAN WEKESA OMOCHA [1994] EKLR** it was stated,

“Section 41(a) (i) of the Limitation of Actions Act which provides:

“This Act does not –

(a) enable a person to acquire any title to, or any easement over –

(i) Government land or land otherwise enjoyed by the Government;....”

21. In **MALINDI ELC 162 OF 2012 OS ANGOTE J** in **ANN ITUMBI KISELI V JAMES MURIUKI MURIITHI [2013] eKLR** considered this issue as hereunder;

1. “The definition of what Government land is for the purpose of computing time in a claim for adverse possession should be considered in the light of the Constitution, 2010.

53. Just like state corporations established under specific Acts of Parliament, the Settlement Fund Trustee is in essence a public enterprise.

54. The classification of land held by State organs, like the Settlement Fund Trustees, as public land is reinstated in Article 62(i) (b) of the Constitution which provides as follows:

“Public land is land lawfully held, used or occupied by any State organ...”

22. The applicant annexed the case of *Kenya Tea Development Authority versus Jackson Gichuhi Karanga & 2 Others, Nairobi High Court Civil Case No. 4994 of 1993 [2006] eKLR*. This is a good authority that where adverse possession is proved, a claimant gets the claimed land. It differs with this case in that the land in dispute here is public land. In the authority, the land was private land. The respondent annexed the case of *Benson Mukuwa Wachira (Appellant) AND The Assumption Sister of Nairobi Registered Trustees (Respondent) Nairobi Court of Appeal CA 121 of 2006 [2016] eKLR*. It is a good authority, inter alia, that adverse possession is tenable in proper circumstances unless the government or the County Government is the owner of the land.

23. Public land, in my view, is synonymous with Government land for purposes of section 41 of the *Limitation of Actions Act and Article 62(1)(b) of the Constitution*. Indeed, the marginal notes of Section 41 of the Limitation of Actions Act have used the words “exclusion of public land” although the section itself talks of “Government land.”

24. In my view the suit land, from the beginning, has always belonged to the government and specifically to the Meru County Council which reserved the same for use by the Kiamaogo Full Primary School and then thereafter for the Respondent which was registered as co-owner. Therefore a claim as to full and exclusionary ownership of the suit land by any of the parties herein would be misconceived. The claim for adverse possession fails for this reason as well.

### **Issue 3: What are the considerations for the Court to allow a claim for adverse possession?**

25. The Applicant has not told the Court when it was registered as a foundation. It did, however, provide the title deed for the parcel which shows the Respondent was registered as proprietor together with Meru County Council in 2002. This means that up to the year 2002, the Meru County Council, on behalf of the government was still the sole proprietor of the suit land. By the time of filing this suit, in 2008, the Respondent had not been the registered owner of the said property for a period of 12 years as provided by statute.

26. **ASIKHE-MAKHANDIA, OUKO, KINOTI JJA, in CIVIL APPEAL 17 OF 2016 CHEVRON (K) LTD V HARRISON CHARO WA SHUTU [2016] EKLR** at the Court of Appeal, opined as follows:

1. **“It is a settled principle that a claim for adverse possession can only be maintained against a registered owner. See Sophie Wanjiku John v Jane Mwhaki Kimani Nairobi ELC Civil Suit No. 490 of 2010.**

2. **Until 1994 the property was Government land hence the period before 1994 does not count for the period to be computed in arriving at the statutory 12 years as there cannot be a claim of adverse possession against public land. See Wambugu v. Njuguna [1983] KLR 172.**

3. **At the expiration of the twelve-year period the proprietor’s title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it.”**

27. It is my opinion that this suit also fails for the reason that the 12 year mark was never attained against the Respondent to support the claim for adverse possession.

28. I opine that the most salient point in a claim for adverse possession is to have undertaken **illegal trespass and hostile (or adverse) occupation and use of the land**. If we inspect the manner in which the Applicant came to be on the suit property, it is clear that the Kiamaogo Full Primary School, which is sitting on the said land, it occupied it after it was reserved by the Meru County Council for the said school. Therefore, this is not a situation in which a third party entered a property without the knowledge or consent of the registered owner. The school came about with the express permission of the Meru County Council which is the registered owner. The Applicants have been managing the same after the DEB approved them as sponsors. Even as of 2002, the Meru County Council is still the registered owner along with the Respondent. Therefore, it suffices to say that the said land is government land and the school sits on the said land with the permission of the government and is managed and sponsored by the Applicant with the knowledge and permission of the County Government.

29. Suffice it to say that even the Respondent cannot claim to be absolute proprietor of the school either as the property is still mainly registered to the County Council of Meru. In all the pleadings before the Court, the Applicant is referred to as “managing” the school (page 21 paragraph 4 and page 47 Applicant’s bound documents) and is also referred to as a “sponsor” (see page 17 Applicant’s bound documents). The very role of a manager is as someone who is contracted by the owner to look after the property. Therefore its involvement with the property cannot be said to be adverse. Indeed, even the respondent cannot evict the school or its managers from the land in dispute.

30. The Court must also note that in this matter, one of the registered owners, the then Meru County Council was never made party to the suit. If this Court gave the orders in favour of the Applicant, the same would greatly prejudice the Meru County Council which has not been heard in this matter. This court will not give such orders. It is noted that the County Government of Tharaka Nithi is the present successor to Meru County Council.

#### **Issue 5: Who should bear costs of this suit?**

31. Given the nature of the use of the suit property being public land, it may be advisable that each party bears its own costs.

#### **CONCLUSION**

32. This suit for adverse possession fails for the reasons that the Applicant does not have locus as it is not the body in actual possession of the suit land, for the reason that the Respondent only became registered owner of the suit property 6 years prior to filing of the suit and for the reason that the suit property is government land held in title by the then Meru County Council and by extension its successors and neither party can claim to possess it adversely.

33. It should be loudly and laconically pronounced for all to hear and in this particular case for the plaintiff and the defendant herein to hear that a public basic education institution shall not be converted to a private basic education institution or to any other private status without consultation with the National Education Board and approval by the Cabinet Secretary. This is the only way the continuation, regularity and security of the education of this nation’s children can be secured from vagaries that may ensue due to competing claims among religious bodies upon educational institutions.

34. In the circumstances, judgment is issued in the following terms:

- a) This suit is dismissed
- b) This suit having evinced a veneer of public litigation, it is ordered that parties do bear their own costs.
- c) Orders accordingly.

**Delivered in open court at Chuka this 11<sup>th</sup> day of December, 2018 in the presence of:**

CA: Ndegwa

M/s Hayata h/b Simiyu for the Respondent

Riungu h/b Kamau for the applicant

**P.M. NJORGE**

**JUDGE**