



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 1014 OF 2012

BISHOP ZACHARIA MANGONDU KIMANI 1ST PLAINTIFF

ZACHARIA K. KURIA 2ND PLAINTIFF

PETER NJIHIA 3RD PLAINTIFF

VERSUS

ROSE MILLICENT ATIENO DEFENDANT

JUDGMENT

INTRODUCTION.

Plaintiffs have sued defendant praying for:

- a. A permanent injunction against the Defendant whether by herself, her employees, servants or agents or any other persons claiming any right or interest through the Defendant from eviction or getting into plaintiffs land known at Title No. Kabete/Kabete/T.253 Kiambu.
- b. A declaration that the plaintiffs are the legal owners of all that piece of land known as Title No. Kabete/Kabete/T.253 Kiambu.
- c. An order that the Title Deed issued to the Defendant in respect of Title No. Kabete/Kabete/T.253 Kiambu issued on 19th June 1992 be cancelled.
- d. Costs and Interest
- e. Any other or further relief this Honourable court deems fit to grant.

Defendant has filed a defence and a counter claim where she claims to be owner of parcel Land No. Kabete/Kabete/T.253 (Suitland) since 1992. Her prayer is for:-

- a) General and aggravated damages
- b) A permanent injunction to restrain the plaintiffs by themselves, servants and/or agents from trespassing into or remain upon Kabete/Kabete T.253.

c) Cost of this suit

d) Interest on (a) and (c)

When the matter came up for hearing on 27/3/17, there was no appearance for defendant. Court confirmed that service had been affected hence the matter proceeded ex-parte.

PLAINTIFF CASE

PW1 , the 1st plaintiff is the one who testified for and on behalf of the other plaintiffs. He is a preacher with African Holy Ghost Christian Church and he adapted his statement of 17/12/12 as his evidence. He contends that the church (African Holy Ghost Christian Church) applied to the County Council of Kiambu for allocation and authority to construct a prayer house on Plot No. Kabete/Kabete/T.253. The Church received a Letter of allotment on 24/5/1975 form the then County Clerk of Kiambu Council.

The church proceeded to construct a prayer house, which was a permanent building as is evident from the photographs availed.

In 2000, the Church learnt that someone was claiming ownership of the plot and hence, a caution was lodged in 2003. On 29/8/12, the Church got a demand letter from Nyakundi & Co. Advocates acting for defendant and the contents there of required the Church to pull down the church building. This appears to be what triggered the filling of this suit on 17/12/2012.

In support of plaintiffs' claim, pw1 has produced the following documents as exhibits;

- Letter of Allotment
- Copies of photograph, of the prayer house
- Letter of 10/8/2007 from Town Clerk Kiambu indicating the status of the land.
- Demand letter from Nyakundi & Co. Advocates.
- Copy of Instruction Letter dated 7/9/12 from S.M Muhia Advocates

DETERMINATION

I have considered the issues raised herein as well as the submissions of the plaintiff. I frame the issues for determination as follows;

- 1) Whether Defendant acquired Title of the suit land through fraud
- 2) Whether Plaintiff has acquired the right to title of the suit land by Adverse Possession.
- 3) Whether Defendant is entitled to *mesne* profits and general damages.

FRAUD

Plaintiff has pleaded that defendant obtained the title to the suit land by fraud. PW1's statement of 17/12/12 does not make any reference to the issue of fraud save to state that: ***"It is clear from the records maintained by County Council of Kikuyu that the said property belongs to the church and not Respondent."***

While PW1 was testifying, he stated that the document in the defendant's list titled ***transfer of land*** has no date, and that the stamp duty was not paid. Plaintiffs pleading on issue of fraud was surely not pegged on the nature of evidence that defendant was to adduce.

For one to acquire a title to land, the land registrar along with other players must be involved in that process of registration. However, plaintiffs have not sued the Land registrar and the Kiambu county council or its successor.

What I have observed is that plaintiffs have submitted on matters that have not been captured in the evidence. The cited case of **Selina Mecca Vs Kennedy Ellam Wekesa** is therefore not applicable herein. It was incumbent upon the plaintiffs to adduce evidence to support their claim and they have failed to do so in so far as allegations of fraud are concerned, the claim fails.

CLAIM OF ADVERSE POSSESSION.

Plaintiffs have pleaded that they are entitled to the land by virtue of adverse possession. Their evidence is that plaintiffs occupied the Suitland in 1975 when they constructed a prayer house, pastor's house, a kitchen and a multipurpose hall.

Whether or not the plaintiffs have been in adverse possession of the suit land is a matter of evidence and this was so held in **Ndiema Samburi Soti versus Elvis Kimtai Chepkeress Court of Appeal C.A. No.136/2005**. In **Kweyu versus Omutut (1990) KLR709**, the Court of Appeal had opined as follows;

“Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford colour, and second, such possession as it will be adverse to the right of a true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued...”

In **Charles Muka Anyanga vs. Nyangweso Omumani (2004)eKLR**, it was held that;

“a claim for adverse possession succeeds or fails depending on whether there is evidence to show that the applicant occupied the suit land adversely to the title of the owner continuously and exclusively for a period of not less than 12 years”.

This court will proceed to analyze the evidence tendered herein to determine if the said evidence meets the criteria for a claim of adverse possession.

1. Open and notorious use of the property;

Plaintiffs claim is that they erected a church on the suit land in 1975. There are photographs confirming the existence of the buildings on the suit land. It is therefore evident that plaintiffs occupation of the suit land has been open and notorious.

2. Exclusive use of the property;

Pw1's evidence is that their church constructed a prayer house, pastor's house, a kitchen and multipurpose hall on the suit land. Again the photographs do confirm the existence of the buildings. I am inclined to believe that plaintiffs have been in exclusive possession of the property, as there is no evidence to the contrary.

3. Continuous / un interrupted use of the property for a period of 12 years.

It has been pleaded by the defendant that she acquired title to the property in 1992, and the title document annexed as RMA2 in defendant's replying affidavit confirms this averment. The only evidence of defendant's assertion of her title to the land is the letter of 29/8/2012 from Nyakundi & co. Advocates to 1st defendant which is actually a demand letter.

In the case of **Elija Ikoha Ikanzo vs. Joseph Ngaira Asutsa (2006)eKLR**, Judge G.B.M. Kariuki made reference to the case of **Marata Wangari Kambi & Another in Nairobi HCCC No. 33 of 2002 (OS)** where the court held that **“as regards the assertion of title, it is not enough**

for a proprietor of the land to merely write to a trespasser. A letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law, and cannot therefore interrupt the passage of time for purposes of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser, but because eviction is not always possible without breach of peace, institution of suit against the trespasser does interrupt and stop the time.”

I do find that plaintiff's occupation of the suit land has been continuous and uninterrupted for a period of more than 12 years.

4. Non permissive, hostile or adverse use of the property.

It is quite apparent that plaintiffs have never been permitted by the defendant to use the land.

My conclusion on the issue of adverse possession is that plaintiffs have been in occupation of the suit land **openly, continuously and without interruption and with the knowledge of the registered owner for a period of over 12 years.** Plaintiffs' claim succeeds on the basis of adverse possession.

IS DEFENDANT ENTITLED TO MESNE PROFITS AND DAMAGES AS COUNTERCLAIMED?

It is trite law that he who alleges must prove. Defendant didn't give any evidence and hence her claim on mesne profit and damages fails.

Conclusion

The final orders of the court are:

- 1. It is hereby declared that plaintiffs have obtained title to the land No. Kabete/Kabete/T.253 Kiambu by way of adverse possession.**
- 2. A permanent injunction is hereby issued against defendant whether by herself, her employees, servant or agents or any other person claiming any right or interest through the Defendant from evicting or getting into Plaintiffs land know as Title No. Kabete/ Kabete/T.253 Kiambu.**
- 3. The counter claim of the defendant is hereby dismissed.**
- 4. It is hereby ordered that the title issued to the Defendant in respect of Land Parcel No. Kabete/ Kabete/T. 253 Kiambu issued on 19th June, 1992 is to be cancelled forthwith.**
- 5. Each party is to bear their own costs of the suit.**

DATED SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2017

HON. L.N. MBUGUA

ELC JUDGE

IN THE PRESENCE OF:-

1. Aswani H/B for Muhia for Plaintiff
2. Mr. Wanjala H/B for Nyakundi for Defendant