



Consolata Catholic Mission Trustees (Registered) v Nyamu (Environment & Land Case 47 of 2020) [2024] KEELC 5797 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5797 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 47 OF 2020**

**OA ANGOTE, J
JULY 31, 2024**

BETWEEN

**THE CONSOLATA CATHOLIC MISSION TRUSTEES
(REGISTERED) PLAINTIFF**

AND

PAUL VARU NYAMU DEFENDANT

JUDGMENT

Introduction

1. In the Complaint dated March 2, 2020, the Plaintiff has averred that it comprises a congregation of missionaries affiliated to the Roman Catholic Church committed to the living conditions of its surrounding communities through the provision of, inter alia, health care, education, food, clean water and social development.
2. The Plaintiff averred in the Complaint that some times in the year 1997, members of the Consolata Shrine Catholic Church, Westlands, requested it to partner with the Church on an intervention in an informal settlement known as “Deep sea” situated at High Ridge, Westlands, Nairobi whose residents were living in very deplorable conditions with limited access to education and health care.
3. It was averred that the Plaintiff agreed to sponsor various projects for development of education and health as well as social and economic empowerment of the residents of “Deep Sea” and that in 1997, it notified the residents of “Deep Sea” of its proposed projects in the area and requested them to identify a suitable location where the proposed projects would be initiated.
4. According to the Plaintiff, the residents of “Deep Sea” identified L. R. No. 209/9944 situated at High Ridge, Westlands, measuring 0.3005 Ha (the suit property) as an ideal area for the proposed projects and that it immediately took actual and exclusive possession of the suit premises and commenced



- construction of various social amenities, including a kindergarten, a chapel, a dispensary, sanitation facilities, a nursery school and an economic empowerment center.
5. It was averred in the Plaintiff that the Plaintiff has continued in uninterrupted actual possession of the suit premises ever since and has continued to further develop and renovate the permanent structures erected therein to suit the changing needs of the residents of “Deep Sea.”
 6. It is the Plaintiff’s case that prior to taking possession of the suit property in 1997 and commencement of the developments thereon, no authorization was sought from the Defendant and none has been sought to date.
 7. According to the Plaintiff, it has been in open, continuous, exclusive and uninterrupted possession of the suit premises without the Defendant’s authorization for a period of over 12 years and that the Defendant’s title to the suit premises has been extinguished by operation of the law.
 8. In the Plaintiff, the Plaintiff has prayed for the following reliefs;
 - i. A declaration that by virtue of the Plaintiff’s uninterrupted possession and occupation of the suit premises for a period in excess of 12 years, the Plaintiff is entitled by way of adverse possession to be registered as the proprietor of all that parcel of land comprised in L. R. No. 209/9944.
 - ii. A declaration that the Defendant’s title to all that parcel of land comprised in L. R. No. 209/9944 has been extinguished in favour of the Plaintiff pursuant to the provisions of sections 37 and 38 of the Limitation of Actions Act.
 - iii. An order to compel the Defendants to execute the necessary documents to effect the transfer of all that parcel of land comprised in L. R. No.209/9944 free from all encumbrances to the Plaintiff within 30 days from the date of the judgment. In default, the DEPUTY Registrar of the court to so execute all the documents necessary to effect the said transfer.
 - iv. A permanent injunction to issue restraining the Defendant whether by himself, servants, agents, assigns and/or representatives from disposing alienating, leasing, charging, subdividing, wasting all that parcel of land comprised in title L. R. No. 209/9944 situated at High Ridge, Westlands within the city of Nairobi or in any way interfering with the Plaintiff’s possession of the aforesaid parcel of land.
 - v. Costs of the suit and interest thereon.
 9. In his Defence dated 11th October 2023, the Defendant denied the allegations in the Plaintiff. The Defendants averred that the Plaintiff should have him before taking possession of the land; that it is true he did not authorize the Plaintiff to take possession of the land and that the Plaintiff has taken over the land fraudulently.
 10. The Defendant denied that the Plaintiff has been in open, continuous, exclusive and uninterrupted possession of the suit premises for a period of over 12 years and that his title has been extinguished by operation of the law.
 11. The Defendant denied that the Plaintiff is entitled to be registered as the proprietor of the suit premises by way of adverse possession.

Hearing and Evidence

12. The Plaintiff’s witness, PW1, informed the court that he is a Trustee of the Plaintiff, a registered corporate body under the Land (Perpetual Succession) Act. PW1 rehashed the contents of the Plaintiff



which I have summarized above. PW1 also adopted his witness statement and produced a bundle of documents as exhibits.

13. It was the evidence of PW1 that the Plaintiff entered the suit property in 1997 and that they put up a perimeter wall around the suit premises in 2005, a dispensary, water tanks and toilets.
14. It was the evidence of PW1 that more than 70 children aged between 7-9 years use the school build on the suit property; that they have an economic empowerment centre for the youth on the land and that they use the centre to rehabilitate the youth who are involved in drugs.
15. According to PW1, they completed the said projects in the year 2006; that they have continued been on the land since the year 1997 without any interruption from the Defendant and that the suit property should be registered in the Plaintiff's favour having occupied it for more than 12 years.
16. A resident of "Deep Sea" area, PW2, testified that she has lived in the area since 1992; that the area is a slum and had no sanitary facilities including toilets and that in 1997, they approached the Plaintiff and told them about their problems.
17. It was the evidence of PW2 that they informed the Plaintiff that they have no hospitals, toilets, schools and other amenities in "Deep Sea" and that the Plaintiff agreed to set up the facilities for them.
18. PW2 stated that they identified the suit property which was vacant and that the Plaintiff put up several projects on the suit land for the benefit of the members of the community within "Deep Sea" and that since 1992, she had never seen the Defendant.
19. PW3 prepared and produced in evidence a certificate of electronic records. It was her evidence that she is an employee of the Plaintiff and that the photocopies produced in evidence to show the existing structures on the suit property were stored in a card reader contained in the camera which was connected to a printer via Local Area Network.
20. PW3 produced in evidence a schedule of the name of the photographer, the camera details, the information transfer, the details of the printer and the photographs.
21. The Defendant, DW1, informed the court that he is the registered owner of the suit property; that he applied for the suit land and which was allocated to him; that he intended to develop the suit property and that the development plans were approved in 1999.
22. It was the evidence of DW1 that he put up on the land semi-permanent structures in 1999; that he was attacked by thugs and was hospitalized until November 2001 and that he later on met Father France with some youths who were putting up structures on the land without his consent.
23. It was the evidence of DW1 that he tried to talk to the Plaintiff's representatives with a view of having the Plaintiff purchase the land and that the Plaintiff intends to deprive him of the suit land.
24. In cross-examination, DW1 stated that from 1981 – 1990, he did not develop the suit land; that he put up structures on the land in 1999 – 2000 which was a store and that he did not have evidence to show the structure that he put up.
25. According to DW1, he did a letter dated 10th November, 2010 addressed to the Plaintiff; that he engaged a valuer to value the land on 13th September, 2012 and that the said valuation shows the illegal structures that have been developed by the Plaintiff on his land.
26. DW1 admitted that there is a church, a dispensary, an education centre and a perimeter fence on the suit property, and that the land has been connected to water and electricity. DW1 stated that it was not him who applied for the water and electricity.



27. DW2 informed the court that she went with the Defendant to the suit property in 2001 and that they found father Franco with other people putting up structures on the suit property. It was her evidence that they saw a temporary structure on the land and that there was no church on the land in 2012.
28. DW3 stated that he built a small store on the land for the Defendant in 1999; that he was out of Nairobi until 2011 when the Defendant asked him to accompany him to go and see Cardinal Njue and that when they visited the land in 2001, they met Father Franco with boys putting up structures on the land.

Submissions

29. The Plaintiff's advocate's written submissions are dated 17th April 2024. Therein, the Plaintiff's advocate summarised the Plaintiff's claim, briefly outlined its case and the Defendant's case and analysed the evidence on record. The Plaintiff's advocate submitted that the Black's Law Dictionary defines adverse possession as an enjoyment of real property opposed to the actual owner's claim over a specific period of time.
30. Counsel cited the classical case of *Mtana Lewa vs Kahindi Ngala Mwangandi* [2015] eKLR which describes adverse possession as, when a person takes possession of land and asserts rights over it for 12 years; and when the land already has a proprietor with title.
31. The Plaintiff's counsel also cited the cases of *Alice Muhonja Kirambi vs Redempta Susan Chetambe & Another* [2018] eKLR, *Celina Muthoni Kithinji versus Safiya Binti Swaleh & 8 Others* [2018] eKLR where the court therein cited the case of *Mbira versus Gachuhi* [2002] eKLR, *Jandu vs Kirplal & another* [1975] EA 225 and *Wambugu versus Njuguna* [1983] KLR 174.
32. According to counsel, the Plaintiff had met all the criteria to be declared an adverse possessor; that the Plaintiff had possessed the suit property since 1997, asserted rights akin to the owner with title by putting up structures and that its possession has been continuous and uninterrupted for a period in excess of 12 years and has been adverse to the title and interest of the Defendant.
33. The Plaintiff's counsel thus urged the court to declare the Plaintiff the owner of the suit property by adverse possession.
34. The gist of the Defendant's written submissions dated 19th April 2024 is that he proved that there was a structure on the suit property which he had erected earlier; that he had attempted to evict the Plaintiff from the suit property and that the Plaintiff was not deserving of the prayers in the Plaintiff.

Analysis and Determination

35. I have carefully considered the parties' pleadings, the evidence and submissions. The Plaintiff's claim that it is an adverse possessor find statutory expression in sections 7, 13, 17 and 38 of the [*Limitation of Actions Act*](#). Section 7 states that,

“An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.”
36. On the other hand, section 13 of the Act provides as follows:

“A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession) and, where under sections 9, 10, 11 and 12 (of the



Act) a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.”

37. The provision of the law that grants this court the jurisdiction to declare one an adverse possessor and confer on him a title is section 38 of the Act which stipulates 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, 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) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”
38. Section 28 (h) of the [Land Registration Act](#) provides that all registered land shall be subject to various overriding interests as may for the time being subsist and affect the same, without their being noted on the register. One of these is rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.
39. The Court of Appeal judges in *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi* [2020] eKLR held that for a person to prove adverse possession, he must prove:
- a. On what date he came into possession;
 - b. What was the nature of his possession;
 - c. Whether the fact of his possession was known to the other party; and
 - d. that the possession was open and undisturbed for the requisite 12 years.
40. The components of proving adverse possession have been reiterated in several other caselaws including the Court of Appeal cases of *Mtana Lewa versus Kahindi Ngala Mwangandi* [2015] eKLR and *Titus Kigoro Munyi v Peter Mburu Kimani* [2015] eKLR.
41. Each and every component of adverse possession needs to be satisfied for the court to declare the Plaintiff an adverse possessor. The first component the Plaintiff needed to satisfy was that it had been in actual and exclusive possession of the suit property continuously and uninterrupted for a period of 12 years.
42. Actual possession means that the adverse possessor is by fact and in reality, in possession of the land so that the true owner would have a cause for trespass. The act of possession must be tangible, demonstrating that the Plaintiff has dominance over the suit property as the true land owner would have had. Possession is marked by physical entry into the suit property and actual occupancy of the land for the prescribed period. [See the cases of *Gabriel Mbui vs Mukindia Maranya* [1993] eKLR and *Kweyu vs Omutut* [1990] KLR 709].
43. ‘Exclusive possession’ denotes that the Plaintiff could not have shared control with the owner unless each person/party is acting in privity with itself. The Plaintiff must have excluded everyone else as if it was the actual owner of the suit property. The proof must be clear that the Plaintiff held the suit property under a claim of right with intent to hold adversely irrespective of if it had actual title or right.
44. The Plaintiff herein attached a copy of the Grant for LR number 209/9944 issued to the Defendant on 27th February, 1992, which was prove that the suit property existed and was owned by the Defendant. The said property measures 0.3005 Ha.



45. According to PW1, the residents of “Deep Sea” identified L. R. No. 209/9944 situated at High Ridge, Westlands, measuring 0.3005 Ha (the suit property) as an ideal area for the proposed projects and that it immediately took actual and exclusive possession of the suit premises and commenced construction of various social amenities, including a kindergarten, a chapel, a dispensary, sanitation facilities, a nursery school and an economic empowerment center.
46. It was stated that the Plaintiff has continued in uninterrupted actual possession of the suit premises ever since and has continued to further develop and renovate the permanent structures erected therein to suit the changing needs of the residents of “Deep Sea.”
47. It is the Plaintiff’s case that prior to taking possession of the suit property in 1997 and commencement of the developments thereon, no authorization was sought from the Defendant and none has been sought to date.
48. According to the Plaintiff, it has been in open, continuous, exclusive and uninterrupted possession of the suit premises without the Defendant’s authorization for a period of over 12 years and that the Defendant’s title to the suit premises has been extinguished by operation of the law.
49. The Plaintiff’s evidence and the testimony of its witnesses clearly shows that the Plaintiff physically entered the suit property and occupied it in 1997 by building a myriad of structures to assist the dwellers of “Deep Sea” area, an informal settlement. The evidence on record shows that the Plaintiff has maintained occupation of the suit property to date.
50. The occupation of the suit property by the Plaintiff was confirmed by the Defendant and his witnesses, who stated that they witnessed the Plaintiff put up structures on the land, and had attempted to convince the Plaintiff to buy the land from the Defendant, but that never happened.
51. The entry of the Plaintiff on the land, according to the Defendant, happened in the year 2001, immediately after he was discharged from hospital. According to the Defendant, he had been away from the suit property since 1999 after a vicious attack on him by thugs which led to his hospitalisation. Although the Defendant asserted that he had built a semi-permanent structure as a store on the suit property in 1999, there was no proof of the same.
52. The Defendant stated in his evidence that the Plaintiff occupied the suit property without his consent. The Plaintiff’s occupation of the suit property was therefore hostile. Having visited the suit property on numerous occasions, the Defendant always found the Plaintiff on-site carrying out its projects but did not take legal action with a view of evicting the Plaintiff.
53. The Defendant did not call evidence to rebut the Plaintiff’s evidence. Indeed, a perusal of the photographs produced in evidence shows an old perimeter wall and the structures inside the suit property. Further, a signage on one of the buildings shows that the “Consolata Shrine Dispensary” was officially inaugurated on 29th April, 2007.
54. Having considered the evidence on record in totality, it is the finding of this court that the Plaintiff has proved its case by demonstrating actual, exclusive, continuous and uninterrupted possession and occupation of the suit property for a period of 12 years without the Plaintiff’s consent.
55. For those reasons, the Plaintiff’s claim is allowed as follows:
 - a. A declaration be and is hereby issued that by virtue of the Plaintiff’s uninterrupted possession and occupation of the suit premises for a period in excess of 12 years, the Plaintiff is entitled by way of adverse possession to be registered as the proprietor of all that parcel of land comprised in L. R. No. 209/9944.



- b. A declaration be and is hereby issued that the Defendant's title to all that parcel of land comprised in L. R. No. 209/9944 has been extinguished in favour of the Plaintiff pursuant to the provisions of sections 37 and 38 of the Limitation of Actions Act.
- c. An order be and is hereby issued compelling the Defendant to execute the necessary documents to effect the transfer of all that parcel of land comprised in L. R. No.209/9944 free from all encumbrances to the Plaintiff within 30 days from the date of the judgment. In default, the Deputy Registrar of the court to so execute all the documents necessary to effect the said transfer.
- d. A permanent injunction is hereby issued restraining the Defendant whether by himself, servants, agents, assigns and/or representatives from disposing alienating, leasing, charging, sub-dividing, wasting all that parcel of land comprised in title L. R. No. 209/9944 situated at High Ridge, Westlands within the city of Nairobi or in any way interfering with the Plaintiff's possession of the aforesaid parcel of land.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31ST DAY OF JULY, 2024

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Ngatia (SC) for the Plaintiff

No appearance for the Defendant

Court Assistant - Tracy

