



African Independent Pentecostal Church of Africa (A.I.P.C.A) v Gathuma (Environment & Land Case 115 & 31 of 2015 (Consolidated)) [2025] KEELC 2944 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEELC 2944 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 115 & 31 OF 2015 (CONSOLIDATED)**

**JO OLOLA, J
MARCH 28, 2025**

BETWEEN

**AFRICAN INDEPENDENT PENTECOSTAL CHURCH OF AFRICA
(A.I.P.C.A) PLAINTIFF**

AND

DUNCAN NDERITU GATHUMA DEFENDANT

JUDGMENT

Background

1. This Judgment is in relation to two suits, being Nyeri ELC. No. 31 of 2015 and Nyeri ELC. No. 115 of 2015 (O.S)
2. In the first suit being Nyeri ELC. No. 31 of 2015, Monicah Wangui Gathuma (now Deceased) had by a Plaint dated 3rd February, 2015 sought the following orders against the Board of Trustees, Africa Independent Pentecostal Church of Africa (AIPCA):
 - a. A permanent injunction to restrain the Defendant, whether by itself, its agents, congregants, servants and/or employees and/or any person purporting to act in that behalf from trespassing, carrying out any construction works, improvements and/or plans to shift its said Academy and/or run a learning institution on LR. No. Tetu/Unjiru/1468, till the conclusion of this case, delivery of vacant possession thereof to the Plaintiff and if need be, by forcible eviction, demolition and carting away of the structures/ improvements they are putting on thereat, by a Court Bailiff assisted by Police at the Defendant's own expense and mesne profits for loss of user, till their moving out and also general damages for trespass; and
 - b. Costs of this suit and interest



3. Those prayers arose from the Plaintiff contention that the said LR. No. Tetu/Unjiru/1468 measuring 0.39 Ha was at all times material registered in the name of her husband the late John Gathuma Waititu. The Plaintiff accused the Defendant Church of illegally encroaching and trespassing onto the said property and thereafter commencing the construction of a learning institution thereon.
4. Some eight (8) days after the first suit was filed, the Registered Trustees of the AIPCA Church instituted the Second Suit being ELC. No. 115 of 2015 by way of an Originating Summons dated 8th April, 2015 seeking orders as follows against the same Monica Wangui Gathuma:
 - a. That the Plaintiff has acquired title by adverse possession to the whole of LR. No. Tetu/Unjiru/1468 situate within Nyeri County;
 - b. That the said LR. No. Tetu/Unjiru/1468 be registered in the name of the Plaintiff and the Defendant do sign all necessary papers of transfer and in default the Executive Officer of the Court to sign the same; and
 - c. That the costs of this suit be provided for.
5. The Originating Summons was supported by two Affidavits wherein the Church asserted that on 22nd April, 2007, Monica's husband John Gathuma Waititu had written a letter returning the property to the church. It was the church's case that they had been using the land since 1958 and that they had developed the same by having Muthuaini Secondary School thereon and were now using the same to run a nursery and Primary School.
6. On 23rd June, 2015, the two suits were consolidated by the consent of the parties with the second suit filed by the Church as the lead file and the reference to the parties being as designated in the lead file.
7. On 4th March, 2018, Monicah Wangui Gathuma passed away. Following an application made herein, she was substituted as a Defendant by Duncan Nderitu Gathuma, the legal representative of her estate.

Analysis and Determination

8. At the trial herein, the Plaintiff called two witnesses while the Substituted Defendant testified as the sole witness in the defence case.
9. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the two parties.
10. By the suit herein, the Plaintiff urges the court to declare that it has acquired the suit property under the doctrine of adverse possession. The Defendant disputes that position and accuses the Plaintiff of trespass onto the property. It is the Defendant's prayer that this court ought to issue an order of a permanent injunction to restrain the Plaintiff from trespassing onto or carrying out any construction on the suit property.
11. The doctrine of adverse possession is founded under the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date of entry into another person's land. Section 38 of the Act provides as follows:

“38(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) of this section shall by registration take effect subject to any entry on the register which has not been extinguished under this Act.”

12. As was stated by the Court of Appeal in *Mtana Lewa –vs- Kahindi Ngala Mwamgandi* (2015) eKLR:

“Adverse Possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya is twelve (12) years. The process springs into action essentially by default or inaction of the owners, the essential prerequisite being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

13. In the matter herein there was no dispute that the suit property is registered in the name of the late John Gathuma Waititu who was the father of the substituted Defendant herein and the husband of the deceased Defendant.

14. In support of their case, the Plaintiff Church called the Chairman of its Muthuaini Church David Ndiangu Wambugu (PW1). Relying on his Affidavit sworn on 14th April, 2015 and filed in support of the Originating Summons, PW1 told the court that the late John Gathuma Waititu was a member of their church and that he wrote to them on 22nd April, 2007 “returning” the land to the Church.

15. PW1 told the Court that the Plaintiff had used the said parcel of land since 1958 and that it had fully developed the same by “having” Muthuaini Secondary School thereon and that it was now using it to run a nursery and Primary School thereon.

16. PW1 did not explain what he meant by the Defendant’s father returning the land to them. A perusal of his testimony during cross examination however reveals that the Plaintiff had always harboured the belief that they were the original owners of the land and that the Defendant’s father had held the land on their behalf.

17. Indeed, while in their Originating Summons the Plaintiffs claim to have acquired the suit property by way of adverse possession, they also purport to be entitled thereto as beneficiaries of a trust. At paragraph 3 of their Statement of Defence dated 14th April, 2015 as filed in response to the Defendant’s claim in Nyeri ELC. No. 31 of 2015, the Plaintiffs plead as follows:

- “3. The Defendant admits that LR. No. Tetu/Unjiru/1468 is registered in the name of the said John Gathuma Waititu, deceased who was registered in trust for the Defendant and avers that the said John Gathuma Waititu wrote a letter on 22nd April, 2007 returning the same to the Defendant.”

18. From the material placed before the court I was unable to see how the plaintiff’s occupation of any portion of the suit land could be deemed as having been hostile to the interests of the Defendant. It was apparent that their entry into a portion of the property had been with the knowledge and permission of the registered proprietor of the land and that the claim for adverse possession could not stand.



19. Having asserted that the late John Gathuma Waititu held the land in trust for the Church, I was unable to see how their interests could again be said to have become adverse to those of the registered proprietor of the land.
20. In any event, having made a claim on the basis of a trust, the Plaintiff ought to have demonstrated that there was an intention by the parties to create a trust during the time the proprietor was registered. While PW1 told the court that their Church was banned by the Colonial Administration during the period of land demarcation and registration and could not therefore be registered as the owner of the land, he did not explain how the Defendants' father came to be registered as the proprietor in trust for the Church. Instead PW1 told the court that John Gathuma Waititu had just put his name on the land recently.
21. As it were, a party claiming adverse possession must assert hostile title in denial of the title of the registered proprietor. The process must start with a wrongful dispossession of the rightful owner and one must demonstrate that the rightful owner has been dispossessed or had discontinued his possession for the statutory period of 12 years.
22. In the matter herein, there was no evidence in support of the contention that the Plaintiffs had been on the suit land continuously from the year 1958 as claimed by the Plaintiff. While the plaintiff produced pictures of the buildings of a school, no survey report was produced to demonstrate that the buildings were on the portion of the land registered in the name of the Defendant's father.
23. In the absence of any proof that the Plaintiff had acquired title to the suit property by adverse possession, the Plaintiff's suit must fail. It was also clear to me that the Plaintiffs had not denied the defendant's claim that they had encroached on a portion of their land. The Defendant has availed proof of ownership of the suit property and are therefore entitled to enjoy all the rights and privileges pertinent to such proprietorship.
24. Accordingly, the Plaintiff's Originating Summons dated 8th April, 2015 is hereby dismissed. I however allow the Defendant's claim in terms of prayer No. (a) of the Plaint dated 3rd February, 2015.
25. Each party shall bear their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 28TH DAY OF MARCH, 2025

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J.O. OLOLA

JUDGE

In the presence of:

- a. Ms. Firdaus Court Assistant.
- b. Mr. Gikonyo Advocate for the Plaintiff
- c. Mr. Duncan Nderitu the Defendant in person

