



**Registered Trustees Kisii Sports Club v Registered Trustees  
Lutheran Church of Kenya (Environment & Land Case 1148 of 2016)  
[2023] KEELC 898 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 898 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 1148 OF 2016  
JM ONYANGO, J  
FEBRUARY 16, 2023**

**BETWEEN**

**REGISTERED TRUSTEES KISII SPORTS CLUB ..... PLAINTIFF**

**AND**

**REGISTERED TRUSTEES LUTHERAN CHURCH OF KENYA .... DEFENDANT**

**JUDGMENT**

1. By a plaint dated October 2, 2008 and amended on August 26, 2010, the plaintiff filed suit against the defendant alleging that the Defendant had trespassed onto her parcel of land known as parcel no. Kisii Town/Block 11/207. The Plaintiff further alleged that though the defendant became the registered proprietors of land parcel No. Kisii Town/block 11/132 in 1981, it is the Plaintiff who has been in continuous and uninterrupted occupation thereby acquiring title by prescription. The Plaintiff seeks the following reliefs:
  - a. A permanent injunction restraining the defendants, their agents and/or servants from further trespassing onto the Plaintiff's land or in any way whatsoever or howsoever, interfering with the same.
  - b. A declaration that land parcel No. Kisii Town/block 11/132 is and has always been part of the Golf Course.
  - c. Damages for acts of waste and desolation committed on the Plaintiff's part of the land by Defendants, their agents and/or servants.
  - d. Costs of the suit.
  - e. Interest on (b) and (c) at Court rates.
  - f. Any other or further relief as the court may deem fit to grant.



2. The Defendant filed an Amended Defence and Counterclaim denying the defendant's claim of trespass. The defendant further denied that the Plaintiff had been in continuous and uninterrupted occupation of parcel no. 132 and that it had acquired title thereto by prescription or at all.
3. In her Counterclaim the Defendant alleged that on diverse dated between the months of August and September 2008, the Plaintiff trespassed onto the Defendant's land and destroyed the fence demarcating the same from the Plaintiff's land and planted a mixture of Cypress and Eucalyptus trees thereon thus denying the Defendant the use and enjoyment of the said plot. The Defendant therefore prayed that the Plaintiff's suit be dismissed with costs and that judgment be entered for the Defendant on her Counterclaim. The Defendant sought the following reliefs:
  - a. A declaration that the Plaintiff is not entitled to enter, use or in any manner whatsoever, interfere with the Defendant's plot known as Kisii Municipality/block/11/132.
  - b. A permanent injunction restraining the Plaintiff from entering and or in any manner whatsoever, interfering with the Defendant's occupation, use, possession, ownership and/or development of the Defendant's plot No. Kisii Municipality/block/11/132.
  - c. An order of eviction of the Plaintiff from Plot No. Kisii Municipality/block/11/132.
  - d. General Damages for trespass and mesne profits.
  - e. Costs of the suit and Counterclaim.
  - f. Interest on (c), (d) and (e) above at court rates.
  - g. Further or other relief deemed just.
4. After considerable delay occasioned by various applications filed by the Plaintiff and failed attempts to settle the matter amicably out of court the case was finally fixed for hearing on diverse dates between December 2013 and July 2019 when both parties testified and called their witnesses.
5. Thereafter the parties entered into a consent that County Surveyor visits land parcels number Kisii Town/block 11/207 and 132 the for purposes of delineating the physical boundaries on the ground with specific reference to parcel 132 with a view to ascertaining how the two parcels of land are situated on the ground in relation to each other. The Surveyor was directed to file his report in court together with the Registry Index Map and a sketch map illustrating how the two plots sit on the ground. The said report was finally filed in court on 20<sup>th</sup> May 2021. The parties were then directed to file their final submissions and both of them duly complied.

#### **Plaintiff's Case.**

6. The plaintiff called two witnesses. Dr. Anil Ratilal Taylor who testified as PW1 stated that he was the Chairman of Kisii Sports Club between the years 2010 and 2013. He informed the court that the club had been in existence for almost 100 years and it had a golf course. The club acquired the Certificate of Lease for the golf course being Kisii Municipality/block 11/207 on 4<sup>th</sup> September 2003. Before the issuance of the Certificate of lease, there was a Part Development Plan for Kisii town dated 9<sup>th</sup> October 1998 showing the location of the golf course.
7. Dr. Taylor testified that the club had fenced the golf club by planting trees along the fence which borders a road leading to the District Commissioner's residence. He told the court that in August 2008, the defendants agents broke down the fence, invaded the golf course and fenced off a portion of the same using fencing posts. The said fencing posts were later removed by passers-by. He testified



that apart from fencing the said portion, the defendants had never occupied any portion of the golf course even though they were issued with a Certificate of lease for Kisii Municipality/block 11/132 on 13<sup>th</sup> June 1981. He further testified that sometime in the year 2000 there were attempts to allocate the defendant an alternative plot as parcel 132 was found to be unsuitable. He produced the Part Development Plan for Kisii Town, the certificate of lease for parcel No. Kisii Municipality/block 11/207, correspondence from the District Physical Planning Office, Kisii as well as an allotment letter and receipt issued to the defendant as Plaintiff's exhibits 1-7.

8. Upon cross-examination, he indicated that the club has two pieces of land, one is where the golf course is situated and the other one is where the club house is. He explained that the club initially occupied a larger area including the portion currently occupied by Christamarianne Hospital, Gusii Show Ground and the Kisii Information Office but they were not claiming the said portions as they no longer form part of the golf course.
9. Dr. Peter Nyangonchonga Omboga testified as PW2. He stated that he a trustee of the club and that he served as its chairman between 1995 and 2000. It was his evidence that the dispute between the plaintiff and the defendant arose in the year 2000 when the defendant's agents fenced off a portion of the golf course prompting the club to institute this case against them. He told the court that he was present during the survey exercise in 1998 and there was no other plot in the golf course. He also stated that when the PDP was prepared, plot no. 132 was not reflected as being part of the golf course.
10. Dr. Omboga testified that he had learnt that a portion of the club's land had been allocated to the defendant but the said allocation had been reversed as it was found to be faulty and the defendant was allocated an alternative piece of land in the year 2000. He told the court that when they realized that the defendant was still claiming a portion of the golf course they entered into negotiations with the defendant with a view to reaching an amicable settlement. They offered them another piece of land which is owned by the club but is not part of the golf course. He produced a letter dated 9.3.2010 as plaintiff's exhibit 8. It was his testimony that if the defendant were to remain on parcel no.132 which they are claiming, it would not be possible to play golf at the club as the said parcel was part of the golf course. He told the court that the club was still willing to give the defendant an alternative piece of land.
11. Upon cross-examination he admitted that that the defendant was issued with a Certificate of Lease in 1981 while the PDP was prepared in 1998. He stated that he could not explain why parcel 132 was missing from the PDP. Pressed to explain whether the defendant had actually been given an alternative piece of land, he stated that the said piece of land was found to be committed and it could therefore not be allocated to the defendant. It was upon the realization that the defendant held a title for parcel 132 which was part of the golf course that the plaintiff offered to give them an alternative piece of land. He told the court that the initial golf course was huge but portions of it had since been hived off and allocated to other institutions. The acreage of the golf course currently stands at about 17 hectares.
12. In re-examination Dr. Omboga informed the court that their intention was to secure the golf course by maintaining the minimum length of a 9-hole golf course without which golf cannot be played at the club. He affirmed that what they were offering the defendant was not less than what they were entitled to. He stated that the defendant had never occupied or developed the portion they were claiming until 2008 when they attempted to fence it. In response to a question by the court, Dr. Omboga stated that the parcel of land they had offered the defendant was in the same area but away from the play area of the golf course and that, the offer was still available. That marked the close of the Plaintiff's case.



## **Defendant's Case**

13. The Defendant called two witnesses. Francis Nyawaro Onderi, a retired Bishop of the Lutheran church and a trustee of the defendant, who was aged 89 years at the time, testified as DW1. He informed the court that when he was serving as a Bishop in Kisii, they were allocated a plot within Kisii golf course. The plot which he described as Kisii Municipality/block 11/132 was registered in the name of the Trustees, Lutheran Church. He produced a copy of the Certificate of lease as Defendant's exhibit 1 and the certificate of official search as defendant's exhibit 2. He told the court that they a put temporary fence around their plot but the same was removed by persons unknown to them. He told the court that they intended to build a church on the said plot. He confirmed that the plaintiff was currently utilizing the plot.
14. Upon cross examination, he stated that the first time they went to the plot was when they fenced it as they wanted to build a church on it. The reason they did not proceed with construction is that the plaintiff instituted this suit against them. He informed the court that he was not aware that they had been issued with an alternative plot which was found to be unsuitable. He could not remember swearing an affidavit to that effect.
15. Steve Mokaya, the Land Registrar Kisii County testified as DW2. It was his testimony that land parcel number Kisii Municipality/block 11/132 was government land which was issued to the defendant on 20.6.1979. The said land measures 0.2 hectares. A Certificate of Lease was issued to the defendant on 30.6.1981. The lease period is 99 years from 1.10.1975. He produced the lease documents as Defendant's exhibits.
16. Mr. Mokaya was unable to confirm the exact location of the suit property or whether the defendant had ever taken possession thereof. He could not tell whether the land was superimposed on the golf course land as he did not have the spatial map for the area.
17. After DW2 concluded his testimony, it was agreed by both counsel that it was necessary that the surveyor visits the land in dispute in order to delineate the golf course and the defendant's land. The court therefore directed the County Surveyor, Kisii County to visit land parcels number Kisii Municipality/block 11/132 and 207 to delineate their physical boundaries on the ground with specific reference to parcel 132 with a view to ascertaining their actual position on the ground. The surveyor was tasked to file a report in court together with a copy of the Registry index map that incorporates both parcels of land and illustrate by way of sketch diagram how the two plots sit on the ground. The said report and maps were filed in court on 20<sup>th</sup> May 2021. In his report, the County Surveyor stated that parcel number 132 is sandwiched between parcel number 207 and a road along parcel number 207.
18. After the County Surveyor's report was filed in court both parties filed their final submissions.

## **Issues For Determination**

19. Having considered the Amended pleadings, evidence on oral and documentary evidence on record as well as the rival submissions, the issues that fall for determination are as follows:
  - a. Whether the Plaintiff is the registered proprietor of land parcel number Kisii Municipality/block 11/207 comprising of the golf course.
  - b. Whether the defendant is the registered proprietor of land parcel number Kisii Municipality/block 11/132.



- c. Whether the Defendant has trespassed on the Plaintiff's land parcel number 207 otherwise known as the golf course.
- d. Whether parcel number 132 has always been part of the golf course.
- e. Whether the plaintiff has trespassed on the defendant's land parcel number 132. Whether the plaintiff has been in continuous and uninterrupted occupation of land parcel number Kisii Municipality/block 11/132 since 1981 and before thereby acquiring title by prescription.
- f. Whether the Plaintiff is entitled to the reliefs sought.
- g. Whether the Defendant is entitled to the reliefs sought.

### **Analysis And Determination**

20. It is common ground that the Plaintiff is the registered proprietor of land parcel number Kisii Municipality/block 11/207 while the defendant is the registered proprietor of land parcel number Kisii Municipality/block 11/132. It is also not in dispute that the plaintiff has been in occupation of both parcels 207 and 132 which form part of its golf course. What is in dispute is whether land parcel number 132 is superimposed on land parcel number 207.
21. The plaintiff's case is that land parcel number 207 was registered in their name and a Certificate of Lease issued to them on 4.9.2003. However, they had since inception in 1906 been in occupation of a large parcel of land which consisted of their golf course. Over the years, portions of their land had been hived off and issued to different institutions including Christamarianne, Hospital, Gusii Show Ground and the Kisii Information Office. The plaintiff's claim that even though land parcel number 132 was registered in the defendant's name in 1981, they have always been in occupation thereof as it forms part of their golf course. This fact was confirmed by PW1 who stated that the defendant was allocated a portion of the golf course. It is therefore no wonder that the plaintiff entered into negotiations with the defendant to try and save the golf course by offering the defendant an alternative piece of land. However, the negotiations did not yield any fruits as the defendant did not accept the piece of land that had been offered to them.
22. In his submissions, Mr. Masese learned counsel for the plaintiff contended that since the defendant has been in exclusive and continuous occupation of the golf course including parcel number 132 even after it was registered in the name of the defendant in 1981, the defendant's title has been extinguished and the plaintiff has acquired the same by prescription of the law.

Section 22 of the *Land Registration Act* 2012 provides that:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner....”

Section 24 of the said Act further provides as follows:

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.



Section 25 (1) of the said Act also provides that:

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section”.

23. In view of the foregoing provisions of the law, it clear that the Defendant is the registered proprietor of land parcel number 132.
24. Even though the plaintiff amended its Plaint and claimed that it had been in exclusive, continuous and uninterrupted occupation of the said parcel and had therefore acquired the same by prescription of the law, the Plaintiff did not abandon its claim of trespass against the defendant thus contradicting itself. A claim of adverse possession cannot co-exist with a claim that the title holder is a trespasser as it is imperative that one who is claiming land by adverse possession acknowledges the owner of the land in question.

In the case of *Kasuve vs Mwaani Investments Limited & 4 others* [2004] 1KLR the Court of Appeal set out what one needs to prove in a case of adverse possession;

...In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition...(emphasis ours).

25. It is also not clear from what date the plaintiff wants the court to infer adverse possession as the plaintiff claims to have been in possession of the suit property continuously since 1906. At what point then did the plaintiff dispossess the defendant?
26. It is apparent that the plaintiff's claim of adverse possession is an afterthought as the original intention was to sue the defendant for trespass. I say so because the Plaintiff only amended his Plaint to include the claim for adverse possession when its application for injunction was dismissed. At any rate, Section 38 of the *Limitation of Actions Act* is clear on when one may sue for adverse possession as it provides that:

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 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.”

27. The procedure for commencing a suit for Adverse possession is provided in order 37 rule 7 of the Civil Procedure Rules which states that:

Order 37 Rule 7 -Adverse Possession

- (7) An application under section 38 of the *Limitation of Actions Act* shall be made by Originating Summons.
- (8) The summons shall be supported by an affidavit to which a certified extract of the title to the land shall be attached.



28. The evidence on record is to the effect that the defendant was erroneously allocated a portion of the plaintiff's golf course. However, no action was taken to correct the apparent error. The Plaintiff has not proved that she dispossessed the owner of parcel number 132 nor has she demonstrated that she engaged in acts which are hostile to the rights and interests of the real owner. Consequently, I am not persuaded that the plaintiff has proved her case for adverse possession. The question of trespass by the defendant also does not arise as there is no doubt that parcel number 132 is registered in the defendant's name.
29. Turning to the defendant's Counterclaim, the defendant proved that she was registered as the proprietor of land parcel number Kisii Municipality/block 11/132 on 30<sup>th</sup> June, 1981. Their title is separate and distinct from the Plaintiff's title for parcel number Kisii Municipality/block 11/207 which was issued on 4<sup>th</sup> September, 2003. The Plaintiff continued to use the land they had been occupying since 1906 even after they were issued with a title that indicated that their land only measures 16.1 Hectares. Parcel number 132 may have been part of the original golf course but once the title was issued to the defendant, it ceased to be so.
30. It is not lost to me that both the Plaintiff the defendant acknowledge that the defendant's land was hived out of the golf course. The report, Registry Index Map and sketch diagram filed by the County Surveyor clearly indicates that parcel number 132 is sandwiched between parcel number 207 and a road that passes along parcel number 207. Both PW1 and W2 testified that if parcel number 132 was removed from the golf course, it would not be possible to play golf as the size of the course would be reduced. It is on record that the Plaintiff is willing to give the defendant a parcel of equal size in the same location but away from the golf course. Given the long history of the club dating back more than 100 years and bearing in mind the significance of the club to the people of Kisii County and the general public, the wider interests of justice would be served if this defendant is given an alternative parcel of land measuring 0.2 hectares away from the golf course in exchange for parcel number Kisii Municipality/block 11/132. The court will therefore allow the parties a period of 120 days to exercise this option failing which the plaintiff shall be evicted from land parcel number Kisii Municipality/block 11/132.
31. The upshot is that the plaintiff's case fails and judgement is entered for the defendant on the Counterclaim in the following terms.
  - a. A declaration is hereby issued that the defendant is the lawful owner of land parcel number Kisii Municipality/block 11/132. However, in the wider interest of justice, the plaintiff shall give the defendant an alternative piece of land measuring 0.2 hectares in the same location but away from the golf course in exchange for parcel number Kisii Municipality/block 11/132 within 120 days, failing which the defendant shall be at liberty to evict the plaintiff.
  - b. The costs of the Plaint and Counterclaim shall be borne by the plaintiff.
  - c. Each party is at liberty to apply.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**J.M ONYANGO**

**JUDGE**

In the presence of;

1. Mr. Masese for the Plaintiff
2. Mr. Anyona for the Defendant



3. Court Assistant: Mr. Oniala

