



**Makokha & 6 others (Suing as the registered trustees of Church of God
In East Africa (Kenya)) v Malula & 3 others (Environment & Land Case
233 of 2018) [2023] KEELC 15758 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15758 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 233 OF 2018
A NYUKURI, J
FEBRUARY 15, 2023**

BETWEEN

**BRYUM A MAKOKHA 1ST PLAINTIFF
JAMES OBUNDE 2ND PLAINTIFF
WYCLIFFE OMUSEBE 3RD PLAINTIFF
RAPHAEL MUYELA 4TH PLAINTIFF
MONICAH OPANGA 5TH PLAINTIFF
BENSON MAOSA 6TH PLAINTIFF
WILLIAM SHIMANYULA 7TH PLAINTIFF
SUING AS THE REGISTERED TRUSTEES OF CHURCH OF GOD IN EAST
AFRICA (KENYA)**

AND

**JEREMIAH MALULA 1ST DEFENDANT
JOHN BENJAMIN MUSYOKI 2ND DEFENDANT
ANGELINA MALONZA MUTETHIA 3RD DEFENDANT
JOHN KID MWAURA 4TH DEFENDANT**

JUDGMENT

1. The Plaintiffs instituted this suit by way of plaint dated January 18, 2016, which was amended on May 10, 2021 and filed on May 19, 2021, where they sought the following orders against the Defendants jointly and severally;



- a. A declaration that the Plaintiff is the lawful registered owner of Land Title No Mavoko Municipality Block 6/869 and that the Defendants are in trespass thereof.
 - b. An eviction order do issue against the Defendants, their family members, servants, agents and any person claiming under them in occupation of Land Title No Mavoko Municipality Block 6/869 and all unauthorized structures erected thereon be demolished forthwith with the supervision of the area Officer Commanding Police Division.
 - c. That a permanent injunction be granted prohibiting the Defendants by themselves, their agents, servants or employees and any person claiming under them from entering, dealing, possessing, offering for sale or rent, selling, transferring, leasing or in any way remaining on the suit property, Land Title No Mavoko Municipality Block 6/689.
 - d. Costs of this suit and interest thereon.
 - e. Any other or further relief as this Honourable Court may deem fit.
2. The Plaintiffs averred that they were the registered proprietor of all that land known as Title No Mavoko Municipality Block 6/869 measuring 0.287 Ha for a term of 99 years from 1st June 2007, having been allocated the same in 1990 and a certificate of lease thereof issued in 2012. The Plaintiffs further averred that upon allocation, the Plaintiffs took possession of the suit property and constructed a church, a school and the pastors house thereon.
 3. The Plaintiffs however complained that between 2012 to 2013, the Defendants without the Plaintiffs' consent unlawfully entered the Plaintiffs' suit property, put up illegal structures thereon and began living on the suit property, which prompted the Plaintiffs to report the matter to the Town Clerk Mavoko, Town Administrator and Sub County Administrator.
 4. It was the Plaintiffs' averment that they issued a 3 months notice to the Defendants requiring them to vacate the suit property but they wrote back indicating their unwillingness to comply.
 5. On March 2, 2016, the Defendants entered appearance by a Memorandum of Appearance dated February 29, 2016 and filed on March 2, 2016. Subsequently, they filed a statement of defence dated March 28, 2016. In the defence, the Defendants denied the Plaintiffs' claim and claimed that they have lived on the suit property since 1970 and contended that it is the Plaintiffs who had encroached on their property.
 6. The Defendants further alleged that they had also applied to be allocated the said property and that since they had been in possession of the same for 36 years without any disturbance, they were entitled to the property by the doctrine of adverse possession. They claimed that title was issued to the Plaintiffs without consulting them. They alleged that they did not unjustly enrich themselves to the tune of Kshs 25,900,000/-. They therefore sought that the Plaintiffs suit be dismissed with costs.

Evidence

7. On the hearing date of October 4, 2022, PW1, Rowland Cleophas Marende adopted his witness statement filed on January 19, 2016 as his evidence in chief. He testified that in the 1970s, the Church of God held their services at St. Paul's Primary School in Athi River and that as the congregation grew bigger, there was need for an alternative place of worship. He stated that the church committee through Pastor Omulindi, wrote a letter requesting to be allocated land within Mavoko Municipal Council. That the request was made in 1987 and that in 1992, the then District Commissioner one Mr Zachary Ogongo wrote a letter to the church confirming allocation of land to the church and asked the church



to survey and develop the same. That the Mavoko Municipal Council issued an allotment letter to the church which land was Marked as MKS 8/90/1. That survey work was done.

8. The witness further stated that in pursuit of the title, the matter was published in the Kenya Gazette Volume CVII No 89 of December 23, 2005, and also through the newspapers but that there was no objection filed. That after the allocation, the Municipal Council reallocated the illegal settlers to a new site at the slaughter. That some of the illegal settlers moved but others declined to move to the new site. He stated that their efforts to remove the illegal settlers on the suit property were in vain. He further stated that the church has also a school with about 250 pupils and both the church and the school serve the community. He stated that the trustees of the church were RT Rev Byrum Makokha, James Obunde and JJ Mainye. He complained that the church was unable to fence the property and further develop the same due to the presence of the Defendants on the suit property.
9. He produced documents attached to his list of documents dated January 18, 2016 as Exhibits in this matter. He produced the plan dated January 29, 1990 as P-Exhibit 1, letter from Machakos District Commissioner dated May 14, 1992 as P-Exhibit 2, Certificate of Registration of Church of God as P-Exhibit 3, letter from Mavoko Municipal Council dated November 14, 2002 as P-Exhibit 4, letter from the Plaintiff dated July 16, 2004 as P-Exhibit 5, letter from the Plaintiff dated June 8, 2005 as P-Exhibit 6 and a letter from the District Physical Planning Officer dated June 15, 2005 as P-Exhibit 7.
10. He also produced newspaper cutting of Taifa Leo and Daily Nation dated December 15, 2005 as P-Exhibit 8, Kenya Gazette Notice No 10337 dated December 23, 2005 as P-Exhibit 9, letter from Municipal Council dated February 10, 2006 as P-Exhibit 10, letter from District Lands Office dated May 3, 2006 as P-Exhibit 11, letter from Ministry of Lands and Settlement dated May 4, 2006 as P-Exhibit 12, letter from Machakos District Commissioner dated October 6, 2006 as P-Exhibit 13, letter from District Physical Planning Office dated October 16, 2006 as P-Exhibit 14, letter of allotment as P-Exhibit 15, Beacon Certificate as P-Exhibit 16, letter from Plaintiff dated July 30, 2007 as P-Exhibit 17, letter from Ministry of Lands dated July 15, 2009 as P-Exhibit 18, rates clearance certificate as P-Exhibit 19, letter from Director of Surveys as P-Exhibit 20, KRA Pin Certificate as P-Exhibit 21, lease for the suit property as P-Exhibit 22, letter from Commissioner of Lands dated June 13, 2012 as P-Exhibit 23, Payment Deposit Slip as P-Exhibit 24, KRA Receipt for Land Rent Payment as P-Exhibit 25, receipts for lease as P-Exhibit 26, certificate of title as P-Exhibit 27, Map for Block 6 as P-Exhibit 28, official search receipts as P-Exhibit 29, application for official search as P-Exhibit 30, Notice to illegal occupants as P-Exhibit 31 and letter from Alphonse Mutinda Advocates as D-Exhibit 32.
11. PW2, Elijah Oyule Oyata, adopted the contents of his witness statement filed on January 19, 2016, as his evidence in chief. He testified that Athi River Church of God is an affiliate of Church of God East Africa (Kenya).
12. He stated that the church was congregating at St. Paul's Primary School in 1987. That the District Commissioner Machakos assisted the church to be allocated the suit property. That the acquisition of the suit property was gazetted and for 90 days there was no objection registered. That on October 23, 2012, the church was issued with a certificate of lease. That they acquired a legal and valid title to the land and have therefore sought to evict the Defendants who are in illegal occupation.
13. PW3, Abel Asibiko, adopted as his evidence in chief, the contents of his witness statement dated May 14, 2021 and filed on May 25, 2021. He testified that he was among the few individuals who pioneered the Athi River Church of God as they hired a classroom at St Paul's Primary School in 1989. It was his testimony that they sought help from Mavoko Town Council to acquire a plot for the church and the then District Commissioner offered them a plot at Bondeni Estate.



14. He further stated that the church got the allotment letter in 2007, the land was subsequently surveyed, beacons placed on the land and a valid title issued in 2012. According to him, the plot has temporary structures which include the church, pastor's house, a school and an ablution block. He further stated that there were illegal occupants on the suit property who ought to be evicted. That marked the close of the Plaintiffs' evidence.
15. As the defendants' counsel was duly served, and being not in attendance together with the Defendant, the defence case was marked as closed, and parties directed to file written submissions. However, none of the parties filed submissions.

Analysis and Determination

16. I have considered the pleadings and the evidence tendered in this matter. In my view, the issues for determination are;
 - a. Whether the suit property belongs to the Plaintiffs.
 - b. Whether the Defendants occupation of the suit property amounts to trespass.
 - c. Whether the Plaintiff is entitled to the orders sought.
17. The Plaintiffs' witnesses gave the history as to how they acquired the suit property. They stated that they sought to be allocated the suit property from the Government. That that request was gazetted in the Kenya Gazette as well as the Daily Newspapers of June 15, 2005. That subsequently, a letter of allotment was issued to them before a lease and certificate of lease were issued to them. The Plaintiffs produced a certificate of lease to demonstrate that they were the registered proprietor of the suit property. The Defendants did not claim title to the suit property. In the defence, their only issue was that they had also applied for a letter of allotment. They also claimed that they were not consulted before the suit property was allocated to the church. They however did not file any witness statements or documents in support of their defence, neither did they give any evidence in defence. Therefore, the Plaintiffs' evidence was unchallenged. The Defendants did not challenge the Plaintiffs' title on ground of fraud, misrepresentation, illegality or corruption. Registration of title grants the title holder an indefeasible and absolute title to property unless the title was unlawfully acquired.
18. Section 26 of the *Land Registration Act* No 3 of 2012 provides as follows;

'The certificate of title issued by 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 subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

 - a. On ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.'
19. It is therefore clear that a certificate of title can only be challenged on grounds of fraud, want of procedure, illegality, misrepresentation or corruption. I have considered the pleadings herein and there was no challenge of the Plaintiffs' title on the above grounds. Before the Plaintiffs were allocated the suit property, the same was Gazetted vide Gazette Notice Vol CVII No 89 of December 23, 2005. Besides, the information was published in the Daily Nation and Taifa Leo of December 15, 2005



inviting objectors in 60 days. Therefore, the contention in the defence that there was no consultation is baseless.

20. As the Plaintiffs have demonstrated the root of their title as being clean as they procedurally and lawfully acquired the same which culminated in their registration as the registered proprietors thereof, I am satisfied that they have proved on the required standard, that they are the lawful owners of the suit property.
21. The Defendants did not dispute the fact that they were in occupation of the suit property. They did content in their defence that they had occupied the suit property since the 1970's and had acquired the same by adverse possession. I note that the Plaintiffs were registered as proprietors of the suit property on October 23, 2012. Before then, the suit property was public land. It is trite law that adverse possession interests cannot accrue as against the Government or in regard to public land. The Plaintiffs were registered as proprietors of the suit property in 2012 and filed this suit in 2016 and therefore the passage of time as against the Plaintiffs was merely four years and not 12 years as alleged in the defence and therefore, the claim for adverse possession which can only arise where occupation was more than 12 years, had not accrued.
22. The *Black's Law Dictionary, 11 Edition*, defines 'trespass' as wrongful entry on another's real property. As the Defendants are not the lawful owners of the suit property, their occupation thereof is unlawful and amounts to trespass.
23. In the premises, it is my finding that the Plaintiffs have proved their case on the required standard and I therefore enter judgment for the Plaintiffs against the Defendants jointly and severally as follows;
 - a. A declaration be and is hereby made that the Plaintiff is the lawful and registered owner of Land Title No Mavoko Municipality Block 6/869 and the Defendants are in trespass thereof.
 - b. The Defendants are ordered to vacate the suit property in 90 days of this judgment and in default an eviction order to issue against the Defendants, their family members, servants, agents and any person claiming under them in occupation of Land Title No Mavoko Municipality Block 6/869 and all unauthorized structures erected thereon be demolished forthwith with the supervision of the area Officer Commanding Police Station.
 - c. A permanent injunction be and is hereby granted prohibiting the Defendants by themselves, their agents, servants or employees and any person claiming under them from entering, dealing, possessing, offering for sale or rent, selling, transferring, leasing or in any way remaining on the property known as Land Title No Mavoko Municipality Block 6/869.
 - d. Costs of the suit are awarded to the Plaintiffs.
24. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 15TH DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms. Njari for Plaintiffs

No appearance for Defendants

Josephine – Court Assistant

