Case Number:	Civil Suit 2276 of 1985
Date Delivered:	28 Jun 2012
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Jackton Boma Ojwang
Citation:	SEVENTH-DAY ADVENTIST CHURCH EAST AFRICAN UNION & 3 others v MOUNT KENYA SDA CHURCH & 4 others [2012] eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 2276 OF 1985

1. SEVENTH-DAY ADVENTIST CHURCH EAST AFRICAN UNION

2. DENNIS KAIJA BAZARRA, CHAIRMAN SDA CHURCH, EAST AFRICAN UNION

3. JOSEPH NGILA KYALE, SECRETARY SDA CHURCH EAST AFRICAN UNION.....PLAINTIFFS

4. THEODORE WOODROW CANTRELL, TREASURER SDA CHURCH, EAST AFRICAN UNION

-VERSUS-

1. MOUNT KENYA SDA CHURCH

2. REUBEN NYAMU MURUATHURUA, CHAIRMAN OF MOUNT KENYA SDA CHURCH

3. JOHN NDIRITU KARITU, SECRETARY AND TREASURER OF MOUNT KENYA SDA CHURCH

4. MOUNT KENYA SECONDARY SCHOOL BOARD OF GOVERNORS.....DEFENDANTS

5. SIMON MUGWERU MURUATHURUA, TRUSTEE OF MOUNT KENYA SECONDARY SCHOOL BOARD OF GOVERNORS

JUDGMENT

I. A CLAIM FOR OWNERSHIP, INJUNCTIONS AND DAMAGES

This suit was lodged by the plaint of ***29th July, 1985*** the claim being for:

(i) a declaration that 1st and 2nd plaintiffs are the rightful owners of the suit premises namely, Plot

No. Karatina Town Block II/105 and Karatina Town Block II/106, and that the defendants are trespassers;

(ii) an Order of perpetual injunction restraining the defendants and all persons purporting to be members of 1st defendant from entering the suit premises without the consent of the plaintiffs;

(iii) an eviction Order;

(iv) general damages for trespass;

(v) *mesne profits* for wrongful occupation;

(vi) costs of the suit;

(vii) interest on the general damages, *mesne profits* and costs.

The plaintiffs pleaded that 2nd, 3rd and 5th defendants who had been members of 1st plaintiff, broke off from 1st plaintiff and established different entities, 1st and 4th defendants; and that 2nd, 3rd and 5th defendants then passed off their new entities (1st and 4th defendants) which were now separately registered, as part of the *continuing enterprise of the plaintiffs* and therefore, lawfully in possession of the suit premises.

II. OWNERSHIP CLAIMS CONTESTED

To the suit, the defendants raised the defence of *res judicata*, contending that the issues in the suit had previously been the subject of another suit, Nairobi High Court Civ. Suit No.1561 of 1975.

The defendants also pleaded that since the Lands Registry had already issued title deeds for the suit plots “in their name,” and the issuer of the title deeds was not joined as a party, the registration of the suit premises could not be nullified.

III. THE EVIDENCE

The hearing of this case began before me on ***6th July, 2004*** and ended on ***8th February, 2008*** with the plaintiffs calling 14 witnesses, while the defendants had two witnesses.

Pastor Fredrick Wangai Kimani (PW1) was posted as the District Pastor of Karatina SDA Church on 1st January, 1958 and found several of the defendants in the local Church membership. While PW1 served at Karatina (1958-1962), the only existing Seventh Day Adventist Church applied for a plot; but it was in 1964 that the Church put up a residential house and an adjacent office on plot No. 268, at Karatina.

It was PW1’s testimony that the period of the late 1960’s witnessed schismatic trends in the SDA Church, in tandem with political agitation against the earlier set-up in which those of the White race

held the dominant positions in the Church. The defendants fell in the camp of those who in 1967, secured the de-registration of the mother-Church in Kenya – even though the SDA Church successfully applied for re-registration in 1969. It was in the interim period, particularly in 1968, that such schismatic activity proved most disruptive of the Karatina SDA Church, and it is from this moment that the strife over the suit properties began.

Pastor Harrison Kungu (PW3) spoke as to the endeavours made in 1967-1968 by members of the Karatina SDA Church to acquire a plot, on which to erect a Church building; at first, he and Pastor Mugweru (5th defendant) were given a letter of authorization by the Karatina Town Council, and later, in 1973 a letter of *allotment* was issued, granting a plot to the Church. The Church leaders undertook to run a school alongside the Church; and the board of governors of the school was elected in 1970.

Reuben Kiprono Arusei (PW4) had been employed as a teacher at the SDA Church school at Karatina in 1970, his emoluments being paid by the Central Kenya Field of the Church; the board of governors had yet to be appointed, and so the school was run directly by the Central Kenya Field. Later in 1970, PW4 became the Headmaster of the school, which was located next to the Karatina Seventh Day Adventist Church. Those teachers who later joined PW4, namely ***Miriam Wanjiku*** and ***Julius Karanja***, similarly, were employed by the Central Kenya Field of the Seventh Day Adventist Church; and when PW4 left at the end of 1971, the school was still being managed by the Seventh Day Adventist Church, Central Kenya Field. All fee payments were made to the Headmaster, who in turn passed it on to the Mission Director, ***Pastor Kungu*** (PW3).

Pastor Elijah Anyange (PW6) was deployed at Karatina by the Seventh Day Adventist Church in 1972, but found a state of agitation in which sections of the congregation were fractiously demanding the reinstatement of one ***Pastor Gathemia*** who had been redeployed. So persistent was this demand, ***Pastor Gathemia*** had to be reinstated. And it was in that year, 1972, that the emerging splinter group in the Seventh Day Adventist Church took possession of the title deed for the suit properties. Thereafter references were now being made to “Mount Kenya Seventh Day Church”, even though the school which it was claiming had its board constituted from local Churches which fell under the set-up of 1st plaintiff.

For the defendants, ***Jane Mathenge*** (DW1) testified that she had become a preacher with Mt. Kenya Seventh Day Church in 1972, and that this Church was inaugurated in 1970, at Karatina. It was her evidence that the suit land where a Church had been constructed, belonged to Mt. Kenya Seventh Day Church which had used it as a place of prayer “for a long time.” The witness testified that there were two different Churches, differently located, at Karatina. She said that the school in question was not part of the Seventh Day Adventist Church, and it was not in any way related to 1st plaintiff. DW1 testified that one of the suit plots belonged to Mt. Kenya Secondary School. She said the suit plots did not belong to the Seventh Day Adventist Church, and that the name of 1st plaintiff had only appeared in one of the certificates of registration on account of a forgery.

IV. CHURCH SCHISM AND PROPERTY CONTEST

The broad outlines of evidence are clear enough. The contest between the plaintiffs and the defendants arose essentially because certain members of the 1st plaintiff saw new openings in leadership and in patrimony; and they rebelled against the hierarchy of the Church, even as they occupied properties to which, otherwise, the mother-Church would have had a claim. The new leaders resorted to ruses and strategies, and ended up with indicia of title to properties which would have been claimed by the mother-Church.

Learned counsel, ***Mr. Nyaberi*** for the plaintiffs submitted that, of the two property titles, L.R.

No. Karatina Town/Block II/106 had been issued in the name of "Mount Kenya Secondary School", whereas L.R. No. Karatina Town/Block II/105 had been issued in the name of "Mount Kenya Seventh Day Adventist Church"; and the mischief of the defendants who came to occupy both plots, was *"to register separate institutions [bearing] similar…[names] [to] the 1st plaintiff's institutional names and [then] misinterpret such names as belonging to them and not the 1st plaintiff."*

Counsel urged that the letter of allotments dated ***17th July, 1973*** and ***6th August, 1973*** had been issued in the names of (i) "Mount Kenya Seventh Day Adventist Church" and (ii) "Mount Kenya Secondary School"; whereas in 1st defendant's certificate of registration the name registered is "Mount Kenya Seventh Day Church."

The plaintiff's case is that "*it is the first plaintiff who was allocated the suit plot and not the first defendant."*

Counsel relied on the Karatina Town Clerk's affidavit in Civil Suit No.2057 of 1997, filed on ***23rd September, 1997*** in which the following averment appears:

"*The Plot No. 7235/451 also known as Title No. Karatina Town Block II/06 was allocated to the 1st plaintiff/applicant for purposes of constructing a Secondary School thereon vide Minute 24/67 of the 3rd defendant's Town Planning and Plot Allocation Committee held on 2nd June, 1967."*

Counsel urged that "*the legal beneficial owner of the suit plot is the 1st plaintiff."*

Mr. Nyaberi submitted that the letters of allotment were issued to 1st plaintiff and to Mount Kenya Secondary School in 1973, well before 1st and 4th defendants were registered. Given this factor of prior allocation of the land to 1st plaintiff, counsel raised an argument in equity: "*where there are two titles to the same parcel of land, the first in time prevails."* Relying on a decision of the High Court (***Lenaola, J.)*** in ***Gitwany Investment Limited v. Tajmal Limited and Two Others***, Nairobi HC Civ. Suit No.1114 of 2002 [2006] eKLR, counsel submitted that *"Mount Kenya Seventh Day Adventist Church have the valid letters of allotment and are therefore the legal owners of the parcel of land."*

V. RES JUDICATA"

Counsel submitted that the plaintiffs' case was not defeated by the doctrine of *res judicata.* Relying on the Uganda High Court case, ***Betty Nalumaga Nyaika v. Serwano Kityaba Kulubya***, Kampala High Court Civil Suit No. 591 of 1994, counsel submitted that in the instant matter, "*the parties are not the same…[for in] Civil Case No. 1561 of 1975 the [Order] sought was only that of……injunction restraining the defendant from trespassing on the land while in the present suit several issues…are raised."*

VI. LOCAL AUTHORITY'S DUPLICITY ON PROPERTY-ALLOCATION INTENT

Learned counsel ***Mr. Maina***, for the defendants, began from the footing that the letters of allotment for the suit properties, issued respectively on ***6th August, 1973*** and ***17th July, 1975*** to "Mt. Kenya Secondary School Board of Governors" and " Mt. Kenya Seventh Day Adventist Church" were issued at a time when the defendants' Church was in existence; by the evidence of DW1, this Church came into existence in 1970.

Counsel urged it to be significant that when the letters of allotment had been issued, 1st plaintiff had written to the local Council seeking to have the name in the allotment amended to read: "Seventh Day Adventist Church East African Union". This request, counsel submitted, was refused, as "*the Town Council of Karatina was very specific on who it had allotted the plots [to]. The allottee had complied and even paid the rates demanded. The Town Council of Karatina knew of the existence of the two Churches and was clear in its mind who it was dealing with."*

VII. DID CRIMINAL PROCESS DEFEAT 1ST PLAINTIFF'S CLAIM"

Mr. Maina urged a secondary point, as disentitling the plaintiffs from any claim to the suit land. This has to do with a criminal case in the history of the suit property – Nyeri Criminal Case No. 66 of 1999, in which the accused was ***Pastor Joseph Ngunjiri Muriithi*** (PW12). In the said case, in which the charge had been, *giving false information contrary to Section 129(b) of the Penal Code*, the pertinent finding of the trial Court was as follows:

"…[the] accused admitted informing the Land Registrar that the original lease was lost…The issue is whether indeed he knew the lease was lost or not. From the evidence and the circumstances surrounding the whole saga, the only conclusion one had to make was that the accused knew that the lease was not lost. The lease was with the officials of Mt. Kenya Seventh Day Church and he knew that [the] Court was told that the dispute started way back in 1975. The dispute was taken to [the] High Court where it is still pending. Accused [No] 1 must have known this……In fact, in 1990 the High Court had ordered that the status quo should be maintained, which meant that [a] transfer should not have been effected."

The Court, in the criminal case, found PW12 guilty, and sentenced him to pay a fine of Kshs.10,000/= or serve an eighteen-month prison term; he elected to pay the fine.

Counsel submitted that, from the evidence it emerged that the plaintiffs had *"tried all sorts of methods to have the land in question registered in their name"*; and urged it to be significant that PW12 had not appealed against the judgment of the trial Court delivered on ***8th February, 2000***.

VIII. FRAUD NOT PLEADED IN THE CLAIM"

Learned counsel submitted that the plaint of ***29th July, 1985***, notwithstanding the requirements of Order 2, Rule 10(1) of the Civil Procedure Rules, contained "*not a single paragraph that alleges fraud or misrepresentation"* on the part of the defendant; and that *"the Court can only grant…the [plaintiffs] what they have pleaded and proved."*

Counsel submitted that the plaintiffs' prayers are not for granting, in view of the terms of the Registered Land Act (Cap. 300, Laws of Kenya), s.28 of which thus provides:

"….the rights of a proprietor whether acquired on first registration or whether acquired 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…"

On the strength of the foregoing provision, learned counsel urged that *"the plaintiffs cannot seek to*

cancel the title which has already passed...."

IX. INTERVENTION BY INTERESTED PARTY

When, during the pendency of this case an interested party/applicant moved this Court by way of application, a Ruling was given, part of which counsel for the

defendant has invoked:

"Although allegations of collusion and fraud had been made against the applicants, it is not obvious in its manifestation, and what the Court sees is normal indicia of legal title in the hands of the applicant. This fact, seen in the context of the elapsed period of time, would ordinarily predetermine the eventual custody of the suit properties, to be retained by the applicant herein. If it comes to that, then the main suit will be left to grapple with the question of damages, and the matter will essentially be between the plaintiffs and the defendants…."

Mr. Maina submitted, from the decision in the said Ruling, that "*the issue of ownership is already determined*"; and that "*failure by the plaintiffs to prove or allege fraud on the part of the [defendant] disentitles them [to a claim in] damages*."

Learned counsel relied on a passage from ***Mutsonga v. Nyati*** (2008) 1KLR (G&F) 1048 (at p.1062 – Kneller, J.):

"Charges of fraud should not be lightly made or considered. ***Mason v. Clarke*** *[1955] A.C. 778, 794;* ***Bradford Building Society v. Borders*** *[1941] 2 All E.R. 205. They must be strictly proved and although the standard of proof may not be so heavy as to require [discharge] beyond reasonable doubt, something more than a mere balance of probabilities is required:* ***Ratilal Gordonbhai Patel v. Lalji Makanji*** *[1957] E.A. 314 (CA-T). In fact a high degree of probability is required:* ***Hornal v. Neuberger Products Limited*** *[1957] 1QB 247, 258. It is very much a question for the trial judge to answer:* ***Gross v. Lewis Hillman*** *[1970] Ch. 445 (CA)."*

X. CLAIM IN TRESPASS, AND FOR MESNE PROFITS: AGAISNT WHICH PARTY"

Counsel further submitted that the plaintiffs' prayer for eviction against the defendant was misplaced: because *"the land is in the name of a third party not party to the suit";* and *"[the] prayer [in] trespass cannot also avail the plaintiffs as they have not proved entitlement, nor is the [defendant] on the suit premises*." Similarly, counsel urged, the prayer for *mesne profits* cannot arise, "*the land having been transferred over twenty years ago."*

XI. PLAINTIFF'S RESPONSE

Learned counsel, ***Mr. Nyaberi*** found it necessary to make responding submissions. Counsel restated that the letters of allotment for the suit premises were in the name of "Mount Kenya Seventh Day Adventist Church", and not "Mount Kenya Seventh Day Church" – and consequently the defendant was not the intended recipient. Counsel urged it to be significant that the Town Council had demanded allotment payments not from "Mount Kenya Seventh Day Church," but from "Mount Kenya Seventh Day

Adventist Church."

Counsel urged to be of no significance, the fact that Criminal Case No.66 of 1999 had ended with the conviction of PW12, in respect of averments made to secure title for the suit properties, in the name of 1st plaintiff.

Counsel submitted that 1st and 4th defendants (namely, "Mount Kenya Seventh Day Church" and "Mt. Kenya Secondary School Board of Governors") were incorporated merely as a cloak for fraud and misrepresentation: and that the intended scheme was "*to appropriate the property of the Seventh Day Adventist Church East Africa Union, the parent of Mount Kenya Seventh Day Adventist Church and to dispose of the property to a third party through….fraud."*

Mr. Nyaberi submitted that it was proper for the Court to make orders of cancellation of the titles to the suit premises. Counsel urged that *"the sanctity of title will be maintained [only] so long as the title in question was not obtained by means of fraud."* He submitted that "*since the title was illegally acquired and should therefore be cancelled, then the current occupier should be evicted…"*

XII. ASSESSMENT OF THE EVIDENCE

It emerges from the evidence that one of the suit properties had been allotted by the local authority to "Mount Kenya Seventh Day Adventist Church", and the other to "Mount Kenya Secondary School Board of Governors." Therefore, the original *intent* was to confer a benefit of *claim to land* upon those two bodies. In *principle,* therefore, this Court guided by equity *would,* all facts being clear and undoubted, seek to affirm such a mode of intended conferment of benefits.

In this whole case, however, the governing questions have been: *who is "Mount Kenya Seventh Day Adventist Church"" Who is "Mount Kenya Secondary School Board of Governors"" How do these bodies relate to "Mount Kenya Seventh Day Church"; and how do they relate to "Seventh-Day Adventist Church East African Union"" Who did Karatina Town Council intend to allot the suit properties to" What was the address of the allottees" Did it matter to the Town Council whether the properties were allotted to the Seventh-Day Adventist Church East African Union or to the faces showing at the Karatina Church, being in charge of the local premises and the postal address, P.O. Box 26 Karatina" What did the local Council intend"*

Much evidence has been brought by the plaintiffs showing that, originally, the Adventist Church presence in the Mount Kenya area was brought by no one but *1st plaintiff*, and that all properties associated with that Church, and all present or future claims to such properties at Karatina, were in the name of 1st plaintiff. This claim, as I perceive it, is not contested; but the evidence also shows that in the late 1960's and in the early 1970's there was a significant *schism from the mother-Church.*

XIII. APPRAISAL AND DETERMINATION

Counsel did not address the Court on *issues of law* as they relate to *schismatic movements within an established Church*: and so I must assume that the followers of the mother-Church in this case had the

free option of remaining or breaking away.

The only issue is that those who broke away from the mother Church, as evidence shows, *had* a more substantial hold on the real estate associated with Church operations than the institutionally-assigned officials of the mother-Church. Counsel did not address the Court on the *scope for legitimate claim on such estate-portfolios* by the mother Church and by the breakaway group, though this is a relevant point, as both groups claimed to enjoy a plausible service relationship with the congregation – and thus, with the local social demands.

The lines of *legitimate claim* being thus unclear, the Court's task would have been more clearly marked if the local authorities had spoken in clear terms as to *the beneficiary* of their estate-allotment. They didn't. When 1st plaintiff sought that its full name be shown on the allotments of land, the Town Council *declined* to do so. But why" Yet at the same time, one of the allotments was to "Mount Kenya Seventh Day *Adventist* Church": was this intended to denote a branch of the mother-Church" The plaintiffs say so; but this is disputed by the defendant, who is simply referred to as "*Mount Kenya Seventh Day Church*." Confusion as to the beneficiary of the allotment, therefore, came directly from Karatina Town Council. This confusion was confounded by the fact that PW12, who attempted to have the confusion removed through a proper allocation in the name of the mother-Church, was prosecuted to conviction as a perpetrator of fraud; and he did not lodge an appeal.

So, what is the valid position that this Court ought to take" It is as follows.

Clearly, Karatina Town Council did make an allotment of the suit properties. That Council made the allotment in *vague terms*, and deliberately declined to clarify the position and to state unequivocally that the allocation was to the mother-Church. Karatina Town Council addressed its correspondence in respect of the suit premises to *whoever* was in control of the address, *P.O. Box 26, Karatina*. From the evidence, the holder of the said postal address was the 1st *defendant* herein. The evidence also shows that it was the 1st defendant and its agents who were substantially in *possession* of the suit premises.

Possession, insofar as it accords the holder all notoriety and presumptive legitimacy, gives " title " where no better title is shown. The plaintiffs herein have not shown any title held by them, such as would defeat the original *possessory claim* of the defendants, in respect of the suit premises. Thus, any third party who would enter into a transaction involving the suit properties, has only the 1st defendant as the valid interlocutor: and it follows that a third party who deals with the defendant, unless fraud on his or her part is shown, is to be taken to have acted in good faith and is an innocent purchaser for value. Such a third party, conventionally, is the darling of equity.

This is the context in which this Court's Ruling of ***13th October, 2010*** is to be seen. In that Ruling the following passage appears:

"Although the main cause remains pending, the instant application [by an interested party having purchased the suit premises] already sheds light on certain ***prima facie*** *scenarios of fact, which should guide the Court at this stage: that the suit properties ceased more than 20 years ago to be on record in the name of the primary plaintiff; were then registered in the name of the primary defendant; and were, lastly, registered in the name of the applicant herein. During the elapsing period, the applicant has effected major developments on the suit properties, and committed them to lines of social development (educational institution) which crystallize sensitive situations. Although allegations of collusion and fraud have been made against the applicants, it is not obvious in its manifestation, and what the Court sees is normal indicia of legal title in the hands of the applicant."*

It emerges that the primary plaintiff, though pursuing a sustained claim running through a time-span exceeding one quarter-century, and though sensibly aggrieved that the estate it was claiming for its followers has ended up as a secular social undertaking through the agency of a rebellious primary defendant, has by no means laid before the Court an iron-clad case; and the conventional balance of probability stands in favour of the *defendants*.

Thus I conclude this long-running case by finding against the plaintiffs. I will make specific orders as follows:

(1)The prayer for a declaration that the 1st and 2nd plaintiffs are the rightful owners of the suit premises, namely L.R. No. Karatina Town/Block II/105 and L.R. No. Karatina Town/Block II/106, and that the defendants are trespassers, is refused.

(2)The prayer for an Order of perpetual injunction restraining the defendants and all persons purporting to be members of 1st defendant from entering the suit premises without the consent of the plaintiffs, is refused.

(3)The prayer for an eviction Order is refused.

(4)The prayer for general damages for trespass is refused.

(5)The prayer for *mesne profits* ***for wrongful occupation is refused.***

(6)The first plaintiff shall bear the defence costs in this suit.

Decree accordingly.

SIGNED at **NAIROBI** ……

J.B. OJWANG

JUDGE

DATED and **DELIVERED** at **NAIROBI** this 28th day of June, 2012.

……..

P. M. MWILU

JUDGE