



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**

**ELC CASE NO.127 OF 2016**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE L.R. NO.SAMIA/LUCHULULO-BUKHULUNGU/384,385,386,387  
AND 388**

**AND**

**IN THE MATTER FOR A CLAIM FOR ADVERSE POSSESSION**

**BETWEEN**

**DAVID GERSON MUDIBO**

**LEONARD H. MUDIBO**

**MILTON MACHIO MUDIBO**

**THOMAS DUNCAN MUDIBO**

**HERBERT ONGÁNGÍ MUDIBO.....APPLICANTS**

**AND**

**LIVINGSTONE WANDERA OGAMA**

**VICKDORY OGAMA**

**OTORO OGAMA**

**HASTINGS OJIAMBO.....RESPONDENTS**

**RULING**

1. The application under consideration is a Notice of Motion dated 23/9/2016 and filed on the same date. The applicants – **DAVID GERSON MUDIBO, LEONARD H. MUDIBO, MILTON MACHIO MUDIBO, THOMAS DUNCAN MUDIBO and HERBERT ONGANYI MUDIBO** – have a land dispute against the respondents – **LIVINGSTON WANDERA OGAMA, VICKDORY OGAMA, OTORO OGAMA and HASTINS OJIAMBO**. The land parcels in disputes are stated to be **SAMIA/LUCHULULO/BUKHULUNGU/384, 385,386,387 and 388** (“suit land” hereinafter).

2. The application is brought under Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010, and originally had four (4) prayers of which only two are consideration at this stage. The two prayers for consideration are as follows:

Prayer 3: That injunctive orders be granted by this Honourable Court restraining the respondents, their sons, employees, dependants, agents and those claiming through them from entering, interfering, developing or otherwise dealing with land parcel numbers **SAMIA/LUCHULULU-BUKHULUNGU/384,385,386,387 and 388** until the hearing and determination of this suit.

Prayer 4: That the costs of the application be provided for.

3. The affidavit sworn in support of the application states, inter alia, that the applicants have occupied the suit land since 1970. A river always marked the boundary between the applicants land and the respondents land. But official records do not reflect this position. The map of the area is said to show that the respondents land crosses over the river, in effect annexing portions of the applicants land. This is what the applicants are contesting. They claim the portions as adverse possessors.

4. Apparently, the applicants have all along used the portions but the respondents are now said to be intending to take possession. In a bid to do that, they have destroyed crops and have diverted the waters flowing into the 2<sup>nd</sup> applicant's fish pond. The respondents also chase anyone from the applicant's village who go to the river to fetch water.

5. I see no response by the respondents to the application. They however purport to have responded vide a replying affidavit dated 14/11/2016 filed here on 24/11/2016. That replying affidavit is entirely responding to the originating Summons that started the suit. It does not make any reference at all to the application at hand.

6. The application herein was canvassed by way of written submissions. The applicant's submissions were filed on 21/2/2017. The Court was urged to grant injunctive relief as the respondents have threatened to destroy the respondent fishing ponds. They have also barred the applicant from accessing the river. According to the applicants the requisite conditions for granting injunctive relief as stated in **GIELA VS CASSMAN BROWN [1993] EA 358** have been met. A further guiding light was said to be found in the case of **FILMS ROVER INTERNATIONAL [1956] ALL E.R 722** where the Court urged the importance of considering the option that carries the lower risk of injustice if it turns out ultimately that the Court was wrong in granting or refusing injunctive relief.

7. The applicant's submissions were filed on 10/2/2017. The applicant's application was faulted for not availing any annexure. The application was said to have failed to meet the threshold required to grant the relief sought. The respondents were said to be the registered proprietors and their interests outweigh the interests of any other person claim possessory rights.

8. It was submitted too that it is not true that the applicants have been in possession of the suit land since 1970. They only started using a small portion of the land in 2010 as licences of the respondents who permitted them to sink a fish pond. They are now taking advantage of that to claim ownership. They have dirty hands, the respondents claimed, and the Court should not exercise its discretion in their favour.

9. I have considered the application and the rival submissions. I have had a look at the suit as filed and responded to. Ordinarily, the application should be one that is easy to allow given that the other side has not responded to it. But there is a fundamental concern that militate against taking a position like that. It is good to highlight these concerns.

10. As filed, the application has no annexures. The respondent's side has raised this issue in its submissions. There are facts deponed to in the supporting affidavit which require the back-up of the necessary annexures in order for them to be adequately demonstrated. For instance, paragraph 5 of the supporting affidavit makes reference to the map of the area. Where is a copy of that map? The applicants may be under the illusion or mistaken assumption that the documents availed when filing the suit can be

used for the application. How wrong it would be to take that position! The documents availed are for use at the trial of the suit. The normal procedure is to have the application brought with its own annexures even if the annexures are the same ones to be used for trial. The annexures to the application have their own story to tell concerning the application just like the documents brought with the suit have a story to tell during trial. The applicants were wrong to omit the annexures. Lack of annexures makes the application incomplete.

11. The other problem concerns the formulation of the injunctive relief. As formulated, the prayers targets the whole of the suit land. Yet is it clear that the applicants are only disputing only portions of the suit land. Infact it is plain that only those portions of the suit land that are on the other side of the river are disputed. The prayer for injunction should have been worded in such a way that anybody looking at it would be sure that it is only portions of the suit land that are targeted, not the whole land. The Court can not assume the task of correcting the prayer for the applicants. It was upon them to get it right. The Court can not injunct the respondents concerning the whole land while only portions of it are disputed.

12. The other problem relates to the parties as sued. In the suit, one **HASTINGS OJIAMBO** is named as a party. This is a suit for adverse possession and what it means is that the applicants want to become adverse possessors against Ojiambo. There is a mandatory legal requirement in a suit for adverse possession that you annex an extract of title deed or at least a document proving ownership of registered land before such suit can be deemed viable. There is no annexure showing that Ojiambo owns any land. There is however an averment elsewhere that Ojiambo is the son of one **KIDUOLI OGAMA** who is deceased. A question then arises: what shows that Ojiambo is the legal representative of Kiduoli? This is an elementary legal consideration that the applicants should have satisfied first. They have not. One wonders then if it would be right in light of this omission to hold that the applicants have a prima facie case against Ojiambo.

13. A problem of similar nature arises in relation to land parcel No.386. Its registered owner is shown as **OKOCH OGAMA**. In the applicants own submissions Okochi is deceased. The respondents are said to have apportioned his land among themselves. Question: Are the respondents shown to be the legal representatives of Okochi. The answer to this is No. How then can the applicants become adverse possessors of Okochi's land without suing the legal representative of his estate?

14. This much is then clear: That neither the application nor the suit as filed are well thought through. At this stage, I am not concerned with the suit. I only mention it because legal requirements in application for injunctive require that we cast a look to see if a prima facie case is made or if, given its nature, damages would be an adequate remedy. Given the observations made so far, it is clear that the application herein is incompetent and therefore a non-starter. It is hereby dismissed.

**A.K. KANIARU**

**J U D G E**

**DATED AND DELIVERED ON 23<sup>RD</sup> MAY 2017 AT BUSIA.**

**IN THE PRESENCE OF:**

**NO PARTY PRESENT**

**BOGONKO FOR RESPONDENT**

**M/S NAMBULINDO FOR APPLICANT**

**COURT CLERK - ICHULOI**

**J U D G E**