



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 19 OF 2021 (OS)**

**MATAWA C BAYA & OTHERS.....APPLICANTS**

**VERSUS**

**STIMA INVESTMENT COOPERATIVE SOCIETY LIMITED.....RESPONDENT**

**RULING**

***(Application for injunction; principles to be applied; applicants claiming adverse possession to land; not clear who the applicants are and how many they are; important that there be no ambiguity over the parties who are in a suit; no report to demonstrate the possession of the applicants; all that the applicants have annexed are photographs and no certification, or report, to tie those photographs to the suit land; prima facie case not established; application dismissed)***

1. This suit was commenced on 4 February 2021 through an Originating Summons taken out pursuant to the provisions of Sections 37 and 38 of the Limitation of Actions Act, Cap 22, Laws of Kenya. Principally in the suit, the applicants seek a declaration that they are entitled to title to the land parcel described as Plot No. 559/III/MN (the suit land), vide the doctrine of adverse possession. Through an application dated and filed on 8 March 2021, the applicants seek orders of injunction against the respondent, so as to have the respondent restrained from evicting, demolishing the houses of the applicants, harassing and/or interfering with the applicants' occupation of the suit land pending the hearing of the main suit. It is this application which is the subject of this ruling.

2. So far, the respondent has not entered appearance and has not responded to the Originating Summons or to the application before me.

3. The case of the applicants is discernible from both the Originating Summons and the supporting affidavit to both the Originating Summons and to the subject application sworn by Matawa C. Baya. He avers that he represents all of the applicants in this suit. He has attached a list of persons and some photographs of houses said to be houses of the applicants on the suit land. Mr. Baya has deposed in the supporting affidavit to the Originating Summons that he has been residing on the suit land for over 17 years and that he has enjoyed quiet possession without interruption. In the supporting affidavit to the application, he has deposed that the respondent has constantly threatened to evict them from the suit land. He has added that the respondent has on several occasions been colluding with police officers to demolish their houses and he has annexed some photographs showing demolished structures. He also avers that after doing some investigations, the chronology leading to the respondent claiming ownership of the suit land is in doubt.

4. Although the application is not opposed, it doesn't mean that I must allow it. The principles upon which an applicant can successfully mount an application for injunction were set out in the case of *Giella vs Cassman Brown (1974) EA 358*. One needs to demonstrate a prima facie case with a probability of success; show that he/she stands to suffer irreparable loss if the injunction is not granted; and where there is doubt, the court will decide the application on a balance of convenience.

5. For a court to make a determination of whether or not a prima facie case has been established, the court inevitably needs to make an assessment of the case as presented, based on the pleadings and the material that the applicant has tabled. The case of the applicants is that they are in adverse possession of the suit land and are thus entitled to ownership of it. To succeed in such a case, it is necessary that the applicants demonstrate that they have been in open, quiet, uninterrupted, continuous possession for at least 12 years. This is articulated in the maxim *nec vi, nec clam, nec precario*.

6. I have several problems with the case at hand. First, it is not very clear to me who the parties are and how many they are. The title in the pleadings has three persons as plaintiffs (Matawa C. Baya, Munga Balu Munga, Mwanakombo Haron) and 75 others. The 75 others are not named in the pleadings. Strictly speaking, they should be named in the Originating Summons as applicants. There is an authority to act, but even when I read it, nowhere is there any particular person being named as the one given authority to act by the others. So that there is no ambiguity, I will set it out in full. It states as follows :-

*“We the undersigned list of member Matawa C. Baya, Munga Balu Munga & Mwanakombo Haron being plaintiffs do hereby give*

*consent to plaintiffs to swear an affidavit on behalf and to act on my behalf in this matter.*

*DATED at Mombasa this 4<sup>th</sup> day of February 2021*

*Signed by the said'*

*Matawa C. Baya (signed)*

*Munga Balu Munga (signed)*

*Mwanakombo Haro (signed)*

7. Now, as I have said, it is not disclosed who the person being given authority to swear affidavits is, for none is named. I cannot consider this as any authority to act.

8. There is a list of names attached to the Originating Summons which I have gone through. That list is handwritten and is titled "Kikambala Villagers" and there are names inserted therein. As far as I can see, this is just a list of names and without these names being in the Originating Summons I am unable to say that these are the names of all the applicants in this suit. The names therein are 81 and if it is the case that they are the applicants, you would expect that number to equal what is in the pleadings, but it does not. The pleadings name 3 persons and state that there are 75 others and this would be 78 persons. The fact that there are some names listed in a list titled "Kikambala Villagers" is not the same as proper identification of the persons in the pleadings. There ought to be no ambiguity over who the applicants are. As I have said the names of the applicants need to be in the pleadings, which is not, and I am now not even clear as to who the applicants in the suit really are. It is very critical for a court to know who the parties before it are, for orders can only be made for or against the said persons and nobody else.

9. Apart from the above, the affidavits really do not tell me much about the reality of possession of the suit land and the time that the applicants are alleged to have been on the suit land. All that Mr. Baya has stated is that he himself has been in occupation of the suit land for over 16 years. However, this suit is being filed on behalf of many others, and one would at least expect a mention of when the other persons came to be in possession of the suit land for the simple reason that time is of great essence in a suit for adverse possession. There is no such deposition in the supporting affidavits. There is also nothing to support the claim that the applicants are on the suit land save for some photographs. I am afraid that mere photographs without them being tied to particular land is not very useful. In cases such as these, it would be prudent for the applicants to file a ground report prepared by an expert, which report will tie the possession of the persons, and any structures, to a particular identifiable land. I have no certification of who took the photographs, when they were taken, and whether they actually are of the suit land. As matters stand, I am unable to tell if the photographs are of the suit land or of other land.

10. In short, I have an issue with who the applicants in this suit are, what nature of possession they have in the suit land, if at all, and whether they have been on the suit land for a period in excess of 12 years.

11. The reason why the injunction is being sought is the allegation that the respondent has been demolishing the houses of the applicants without a court order. This is a serious allegation and one would expect this to be backed up with certain important facts, such as when such demolition took place, and whose house was demolished. There is no mention of these at all.

12. There are clearly very material facts that have not been disclosed. I am afraid that I am unable to exercise my discretion to issue an injunction when material facts have not been presented before court. I ask myself why the applicants have failed to disclose these very material facts. Without proper pleadings and without clear facts to support the claim of adverse possession, I am unable to find that the applicants have demonstrated a prima facie case with a probability of success. I am thus not persuaded to allow this application and it is hereby dismissed. Since it was not opposed, I make no orders as to costs.

13. The effect is that the applicants will need to prove their case without the benefit of an order of injunction.

14. Orders accordingly.

**DATED AND DELIVERED THIS 13<sup>TH</sup> DAY OF JANUARY 2022.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA.**