



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**ENVIRONMENT AND LAND CIVIL CASE NO. 12 OF 2011 (OS)**  
**IN THE MATTER OF THE REGISTERED LAND ACT, CAP 300, LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF LIMITATION OF ACTIONS ACT, CAP 22, LAWS OF KENYA**  
**BETWEEN**  
**BENSON OGUTU OGERO.....APPLICANT**  
**VERSUS**  
**ELLY CHEKATA AMBANI.....1<sup>ST</sup> RESPONDENT**  
**ROBERT NYAKUNDI MANDIEKA.....2<sup>ND</sup> RESPONDENT**  
**BEATRICE DALISU NYAKUNDI.....3<sup>RD</sup> RESPONDENT**  
**TRUPHENA MORAA MBUTA.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. What is before me is the applicant's application dated 24<sup>th</sup> March 2014 seeking the following prayers:
  - a. That the application be certified as urgent and the same be heard ex parte in the first instance.
  - b. That pending the hearing and determination of the application a temporary injunction do issue against the respondents by themselves or their agents and or servants and or any persons acting on their behalf from entering onto, clearing and or cutting down of any trees or vegetation, digging tilling and/or erecting any structures and/or in any manner interfere with suit land No. Kisii Town/Block I/196.
  - c. That pending the hearing and determination of this suit a temporary injunction do issue against the respondents by themselves or their agents and/or servants and/or any persons acting on their behalf from entering onto, clearing and/or cutting down of any trees or

**vegetation, digging, tilling and/or erecting any structures and/or in any manner interfering with the suit land No. Kisii Town/Block I/196.**

**d. That the costs of the application be provided for.**

The applicant's application was supported by the affidavit sworn by the applicant on 24<sup>th</sup> March 2014. The application was also brought on the grounds set out on the face thereof. In the said affidavit and grounds in support of the application, the applicant has stated that he brought this suit against the respondents on 1<sup>st</sup> February, 2011 claiming all that parcel of land known as, LR. No. Kisii Town/Block I/196 (hereinafter referred to only as "**the suit property**") by adverse possession. The applicant has stated further that he had brought an earlier application for injunction against the defendants which application was withdrawn by consent on 13<sup>th</sup> March 2013 so that the parties may proceed with the hearing of the main case. The applicant has claimed that immediately the said application was withdrawn, the respondents entered the suit property, cut down the trees and vegetation thereon and started digging foundation trenches for purposes of commencing construction of structures thereon. The applicant has claimed that the respondents' actions aforesaid would interfere with the building materials that the applicant had assembled on the suit property and that the same is intended to defeat the applicant's interest in the suit property. It is on account of the foregoing that the applicant has sought the injunctive reliefs set out hereinabove.

2. The applicant's application was opposed by the respondents. The respondents filed a replying affidavit sworn by the 2<sup>nd</sup> respondent on 26<sup>th</sup> March 2014 on his own behalf and on behalf of the other respondents. In his affidavit, the 2<sup>nd</sup> respondent has deposed that prior to the withdrawal of the applicant's previous application for injunction on 13<sup>th</sup> March 2014 the said application had been pending in court for over 3 years. The 2<sup>nd</sup> respondent has denied that the applicant has ever taken possession of the suit property. He has contended that the trees alleged to have been cut down by the respondents are outside the suit property and that in any event the applicant has never planted any trees or fruits on the suit property. The 2<sup>nd</sup> respondent has contended that the suit property is in the possession of the 4<sup>th</sup> respondent who is the registered owner thereof and who is the one making use thereof. The 2<sup>nd</sup> respondent has contended further that the applicant's application herein has no basis and should be dismissed with costs.

3. When the applicant's application came up for hearing on 3<sup>rd</sup> April 2014 Mr. Soire, advocate appeared for the applicant while Mr. Mokuu, advocate appeared for the respondents. In his submission, the applicant's advocate contended that the applicant who claims the suit property by adverse possession was in possession of the suit property until 15<sup>th</sup> March 2014 when the respondents invaded the same and carried out the activities complained of in the applicant's affidavit in support of the application herein. The applicant's advocate referred the court to the photographs annexed to the applicant's affidavit as evidence of the respondents' interference with the suit property. The applicant's advocate submitted further that the respondents in their affidavit in reply did not deny entering the suit property as claimed by the applicant.

4. In his submission in reply, Mr. Mokuu submitted that the applicant has never been in possession of the suit property and as such the issue of his trees being cut down does not arise. The respondents' advocate submitted further that the applicant has not met the conditions for granting a temporary injunction. Counsel submitted that possession must be real. The respondent's advocate submitted further that the applicant having failed to prosecute his earlier application in which he had obtained interim orders, the present application is an abuse of the process of the court. Counsel reiterated that the photographs annexed to the applicant's affidavit in support of the application herein were taken elsewhere because it is the respondents who have all along been in possession of the suit property. The respondents advocate submitted that the respondents who have all along been in possession of the suit property cannot be prohibited from entering the same. The respondents' advocate urged the court to dismiss the applicant's application with costs.

5. I have considered the applicant's application together with affidavit filed in support thereof. I have also considered the respondent's affidavit in reply filed in opposition to the application. Finally, I have considered the oral submissions by the advocates for both parties. The law on temporary injunction is now settled. An applicant for a temporary injunction must demonstrate that he has a prima facie case with a probability of success against the respondent. The applicant must also show that he stands to suffer irreparable harm unless the order is granted. In the event that the court is in doubt as to the above, the court would determine the application on a balance of convenience. The applicant's claim against the respondents is based on adverse possession of the suit property. For the applicant to succeed in the present application, the applicant has to demonstrate on a prima facie basis that he is likely to succeed in his claim against the respondents. In this regard, the applicant has to place evidence before the court in support of the ingredients of a claim for adverse possession. For a claimant of land by adverse possession to succeed, he must demonstrate that he has been in possession of the land openly and continuously for uninterrupted period of 12 years or more. The applicant was therefore under a duty to explain how and when he went into possession of the suit property. The applicant was also under a duty to demonstrate that he has been in possession of the suit for 12 years or more and that his possession has been open and uninterrupted. In his affidavit in support of the originating summons, the applicant claimed that he purchased the suit property from the 2<sup>nd</sup> respondent in the year 1998 and that he took possession immediately thereafter, erected a perimeter wall around the same, dug and put up a pit latrine. The applicant has also claimed that he also planted various food crops on the suit property. The applicant claimed that as at the time he was coming to court, he had had uninterrupted possession of the suit property for about 21 years. In the present application, the applicant has not placed any evidence before the court to prove that he has been in occupation of the suit property.

6. The applicant has not demonstrated that he has a perimeter wall around the suit property. There is also no evidence of the alleged pit latrine and the food crops which the applicant claims to have been cultivating on the suit property. The photographs which have been exhibited by the applicant depicts undeveloped parcel of land which has been cleared recently. It is contested whether the trees shown to have been cut in the photographs belongs to the applicant or not. From the totality of the evidence presented to court, I am doubtful whether the applicant has had continuous possession of the suit property since 1998 as he has claimed. In the same breath, I am doubtful whether the applicant has a prima facie case against the respondents based on adverse possession. Apart from establishing a prima facie case, the applicant also had a duty to demonstrate that unless the orders sought are granted, he will suffer irreparable harm. Having expressed doubt on the applicant's alleged occupation of the suit property, I am equally doubtful whether the applicant would suffer irreparable harm if the orders sought are not granted.

7. In view of the conclusion that I have arrived at hereinabove, the applicant's application falls for consideration on a balance of convenience. Both the applicant and the respondents claim to be in possession of the suit property. None has demonstrated such occupation. As I have stated above, the photographs that I have before me shows undeveloped parcel of land. The land seems not to have been developed by either party. The balance of convenience does not therefore tilt in favour of either party. In the circumstances, the order that appears to me to be appropriate to make is that which would maintain the status quo as it is at the moment. Due to the foregoing, the applicant's application dated 24<sup>th</sup> March 2014 is disallowed. Instead, it is hereby ordered that pending the hearing and determination of this suit, the status quo prevailing as at the date hereof in relation to the suit property as concerns its title, use and possession shall be maintained by all the parties to this suit. The costs of the application shall be in the cause. For the avoidance of doubt, the suit property shall remain in the same state in which it is as at the date hereof.

**Delivered, dated and signed at Kisii this 16<sup>th</sup> day of May 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Soire            for the Applicant

N/A                    for the Respondents

Mr. Mobisa         Court Clerk

**S. OKONG'O**

**JUDGE**