



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 213 OF 2020

JOSHUA MUEMA SITA & OTHERS.....PLAINTIFFS

VERSUS

JIPE MULTI-PURPOSE CO-OPERATIVE SOCIETY LIMITED.....1ST DEFENDANT

DEPUTY COMMISSIONER, TAITA TAVETA COUNTY.....2ND DEFENDANT

OFFICER COMMANDING POLICE DIVISION, TAVETA.....3RD DEFENDANT

REGISTRAR OF LANDS, MOMBASA.....4TH DEFENDANT

THE HON. ATTORNEY GENERAL.....5TH DEFENDANT

RULING

(Application for injunction; principles to be considered; plaintiffs laying claim to land registered in name of the 1st defendant; claim based on long occupation of the land; 1st defendant arguing that it had a previous case with squatters and judgment given in her favour and that some of the plaintiffs were defendants in the previous suit; need to have clarity on who the plaintiffs are; suit said to be filed by 10 persons on behalf of 404 others; those 404 others not disclosed in the plaint; not clear who the plaintiffs exactly are; cause of action said to be long occupation of land; no provision of law giving title by mere long occupation; suit not seeking any prayers of a declaration under doctrine of adverse possession; factual basis of occupation of suit land not adequately demonstrated; 1st defendant having judgment in her favour and not dispelled by plaintiffs that some of the persons purporting to file suit were not parties in the previous suit; application dismissed)

1. This suit was commenced through a plaint filed on 20 November 2020. Together with the plaint, the plaintiffs filed an application seeking orders of injunction pending hearing of the main suit. It is that application for injunction which is the subject of this ruling.

2. The plaint has 10 named persons as plaintiffs, and it is said that they bring this suit on their own behalf and on behalf of residents of Majengo, Kasaani and Salaita Villages. The title of the plaint states that the suit is filed by the 10 persons and 404 others. The subject matter of the suit is the land parcel No. 10287/3 located in Jipe area, in Taita Taveta County. It measures approximately 1040.4 hectares (the suit land) and is registered in the name of Jipe Multipurpose Co-operative Society Limited, the 1st defendant herein. The 1st defendant became registered as proprietor on 12 November 2004. The plaintiffs contend that by the time the 1st defendant became registered as proprietor, a majority of the plaintiffs were on the suit land. It is averred that the plaintiffs reside in Majengo, Kasaani and Salaita villages within the suit land. They state that there is a history on their occupation. They allege that those who occupy Majengo Village were transferred here in the year 1997 by the Government of Kenya during the El Nino season, and that after the floods, they continued living here. For Kasaani and Salaita Villages, it is said that the residents have been living here as far back as 1972 and have treated where they occupy as their home. They contend to have established permanent residences on the land and have been planting trees and crops for their subsistence. They aver that there are public and social utilities on the land including churches, a water pan, polling stations, schools, and a borehole done by the Government in 2007. They claim that their occupation has been continuous and uninterrupted and they have thus acquired title through prescription. It is pleaded that when constructing the Mwatate-Taveta Road, the Government through the Kenya National Highways Authority collected data on the plaintiffs affected and the value of compensation to be paid to them. They plead that from the week of 26 October 2020, they started seeing strange visitors accompanied by Government surveyors who informed them that the 1st defendant has a court order that will be used to evict them. They aver that they have not been served with any notice under Section 152E of the Land Laws (Amendment) Act, 2016 which they plead is the set out procedure for eviction of persons in occupation of land. In the suit, they seek the following orders :-

(a) A declaration that in enacting Section 152E and G of the Land Laws (Amendment Act), 2016, Parliament elevated that section to a constitutional provision for public participation in line with Articles 188 and 10 (2) (A), 118 (1) (B), 69 (1) (D), 174 (C), 184 (1),

B, 232 and 4th Schedule Part 2 (14) Of the Constitution.

(b) A declaration that evicting the plaintiffs, a large number of the population without compliance with Articles 188 and 10 (2) (A), 118 (1), B, 69 (1) (D), 174 (C), 184 (1), B, 232 and 4th Schedule Part 2 (14) of the Constitution is unconstitutional null and void.

(c) An order of injunction restraining the 1st defendant by itself, its servants, agent or through the 2nd, 3rd, and 5th defendants from, selling, auctioning, transferring, depositing the suit property or evicting the plaintiffs from the suit property or interfering with their peaceful occupation of the suit property.

(d) A declaration that the plaintiffs have acquired Title to Plot LR No. 10287/3 by virtue of their long uninterrupted continuous occupation.

(e) An order of cancellation of the current Certificate of Title No. CR No. 97348/1 in the name of the 1st defendant, Jipe Multipurpose Co-operative Society Limited.

(f) A further mandatory order, commanding the 5th defendant through the relevant ministry to reposes LR No. 10287/3 and subdivide it through the 4th defendant into portions currently occupied by the plaintiffs and issue new title deeds to each of the plaintiffs over the portion of the suit property they currently occupy.

(g) Any other relief the court may deem as expedient.

(h) Costs of the suit.

3. In this application, the plaintiffs seek orders of injunction to restrain the 1st defendant, or through the agency of the 2nd, 3rd, and 5th defendants, from evicting them, demolishing their homes and structures, or in any other manner whatsoever interfering with their peaceful existence on the suit land pending the hearing and determination of this suit. They also want an order “in the form of judicial review” of “prohibition and injunction” restraining the agents of the 2nd, 3rd and 5th defendants from evicting, arresting and prosecuting or in any manner whatsoever interfering with their peaceful existence on the suit land pending hearing and determination of this suit. Their application is based on grounds inter alia that they have a prima facie case; that they have raised constitutional issues in their plaint relating to the law on eviction of squatters under Sections 152 E and G of the Land Laws (Amendment Act), 2016; that they have been in occupation of the suit land for more than 15 years; that they have never been served with eviction notices; that they are a large population consisting of more than 500 households. The application is supported by the affidavit of Joshua Muema Sita, who has more or less reiterated what is pleaded in the plaint and which I have already set out above and see no need of repeating save to add that he has mentioned that they have held several meetings to address their common challenge of obtaining title to the suit land. I however note that the said affidavit is not dated.

4. The 1st defendant filed a replying affidavit sworn by Kipasha Lawrence Mlondwa the treasurer of the 1st defendant. He has deposed that the 1st defendant is a cooperative society registered in the year 1987 under the Cooperative Societies Act (Cap 490) Laws of Kenya. He has deposed that in the year 1989, the 1st defendant purchased from Mama Ngina Kenyatta and Basil Criticos, land measuring 1040 hectares on behalf of the members of the 1st defendant for the sum of Kshs. 3,567,000/=. This is now the suit land. The transfer was effected on 12 November 2004 and title was issued with the parcel identified as LR No. 10287/3. He has deposed that the 1st defendant intended to settle its members, who number over 2,000, on the suit land and embarked on subdivision of the same. The exercise could not however be completed as there were squatters, whose number was 60. The 1st defendant thus commenced suit against the squatters to have them removed. This is the suit *Mombasa HCCC No. 157 of 2007 Jipe Multipurpose Cooperative Society Limited vs Elijah Ole Saronge & 59 Others* and he has attached a copy of the plaint. He has deposed that the squatters filed defence but judgment was entered in favour of the Society through a ruling of 11 December 2008. He has annexed a copy of the ruling. Warrants to give vacant possession were issued but the process delayed as some of the defendants in the suit moved court to set aside the judgment and obtained some stay orders. The application was eventually dismissed on 8 October 2015. The court orders could not however be enforced owing to financial challenges as an amount of Kshs. 2,500,000/= was required for the exercise. He has denied occupation by the plaintiffs and the alleged 4,200 other persons who have not been named. He has averred that he has gone through a list attached by the plaintiffs (being a list of the persons who the plaintiffs purport to file suit on their behalf) and he has identified the names of Mutinda Ndolo and Mary Wavinya Ndeti who were defendants in the previous suit. He has deposed that at the time they filed suit, the villages referred to as Majengo, Kasaani and Salaita, did not exist and even today, he is not aware of such villages only that he is aware of Salaita Hill. He has deposed that when they filed suit, there were 60 squatters and the other plaintiffs must have illegally entered the land after conclusion of the case in the year 2015 and adverse possession cannot arise. In respect of compensation by Kenya National Highways Authority (KENHA), he has stated that the plaintiffs were only compensated for structures demolished in the process of construction of the Voi-Taveta highway and that compensation for the land, being Kshs. 4,559,589/= was paid to the 1st defendant. He has annexed a copy of the award. He has added that the issue of genuine squatters was settled by the Government who through the Settlement Fund Trustees, set up Jipe Settlement Scheme, where almost all squatters in the area were settled, with the remaining ones being settled at Wanainchi Settlement Scheme. He contends that the plaintiffs are recent invaders of land who came in after the ruling of 2015 and they even approached the adjudication office in the year 2019 to have the land adjudicated to them which was rejected.

5. The 2nd respondent filed an affidavit to oppose the motion. The same is sworn by Joseph Maina, who is the Deputy County Commissioner, Taveta County. He has deposed that illegal meetings held by the plaintiffs do not amount to proof of ownership of the suit property. He has stated that there exists a court order presented to the 3rd respondent dated 30 January 2009 declaring the 1st defendant as the owner of the suit property and he avers that this is a judgment *in rem* and the issue of ownership cannot be relitigated again in this court. He has averred however that they have not received instructions to evict the plaintiffs from the suit land. It is further claimed that this court has no jurisdiction as the land is located in Taita Taveta County. There are grounds of opposition filed which echo the above.

6. The plaintiffs filed a supplementary affidavit, again sworn by Joshua Muema Sita. He avers that the 1st defendant has not annexed a letter of identity or authority and thus Mr. Mlonwa has no locus to swear the affidavit. He has deposed that he has spoken to Mutinda Ndolo who informed him that he was not party to the previous suit and this must be a case of similar names. In relation to Mary Wavinya, he avers that there is no such name in this suit. He has challenged the first defendant to show how they got the names of the defendants in the suit *Mombasa HCCC No. 157 of 2007*. On the existence of the villages, he has annexed voters cards showing existence of Salaita and Kasaani as early as 2007 and he has repeated what he earlier stated about how Majengo village came to be. In relation to the settlement scheme he has deposed that there is a pending suit, *Ramadhan Mathenge Kamozi & Others vs Attorney General & Others, Mombasa ELC No. 6 of 2019* and none of their members are parties to that case. He has deposed that they could not get compensation from KENHA since they had no title in their name but they received compensation for their developments. He has deposed that their presence is known by the administration and that is why they even have schools and voting centres and that various projects on the land are sponsored by the County Government, the CDF, LATFF and the central Government.

7. I have taken note of the submissions made by Mr. Muniyithya, learned counsel for the plaintiffs; Mr. Kiarie, learned counsel for the 1st defendant; and Ms. Njau, learned State Counsel for the 2nd – 5th defendants. This is an application for injunction and I stand guided by the principles set down in the case of *Giella vs Cassman Brown (1975) EA 358*. To succeed in an application for injunction, an applicant needs to demonstrate a prima facie case with a probability of success; demonstrate that he stands to suffer irreparable loss if the injunction is not granted; and where the court is in doubt, it will decide the application on a balance of convenience. Before I got into these, let me quickly dispose of two issues raised. The first is the issue of jurisdiction raised by the 2nd – 5th defendants. I don't know where this is coming from, for this court covers Taita Taveta County as well, for there is no Environment and Land Court established in that county. This court therefore has jurisdiction to hear the matter. The second issue was that raised by the plaintiffs, that Mr. Mlonwa, who swore the affidavit on behalf of the 1st defendant has no locus. Mr. Mlonwa is an official of the 1st defendant. I have no material before me to suggest that he is not authorised to swear an affidavit on behalf of the 1st defendant and I cannot hold that he is not so authorised on the mere allegation of the plaintiffs. I see no substance in that objection.

8. Let me now assess whether the plaintiffs have demonstrated a prima facie case with a probability of success that being one of the primary considerations.

9. I must say at the outset that I am not persuaded that the plaintiffs have demonstrated a prima facie case with a probability of success for the following reasons :-

(i) Lack of certainty on who the plaintiffs are

10. It cannot be said that there is a prima facie case demonstrated when it is not even clear who the parties that have sued are.

11. In the plaint, only 10 persons are named as plaintiffs. It is then said that there are 404 others. The names of these 404 others is not in the plaint. This plaint does not therefore comply with the mandatory provisions of Order 4 Rule 1 (1) which provides inter alia as follows :-

1(1)The plaint shall contain the following particulars :-

(a).....

(b)The name, description and place of residence of the plaintiff, and an address for service;

12. It will be seen from the above, that the name, description and place of residence of the plaintiff must be disclosed. If there are many plaintiffs, then the plaint must contain and disclose the names of all the plaintiffs in the title, and must in the body also disclose their description and their place of residence. If this suit is being filed by 414 people (the 10 named plaintiffs and 404 others), then the 414 persons who have filed suit must be disclosed in the plaint and they must be specifically named as plaintiffs. You cannot say that you have a competent suit, or a prima facie case, when the people who have sued have not been identified and disclosed. A defendant is entitled to know the identity of the persons who have filed suit so that he can be able to properly defend himself. You cannot defend yourself in a suit when you do not even know who has sued you. In our case, nobody knows who the 414 persons that have filed suit are, apart from the 10 who have been disclosed, and it is not enough to only partially disclose some of the plaintiffs and conceal others. It is mandatory that all persons who are plaintiffs be named in the plaint as required by the rules which I have demonstrated above.

13. To be fair to the plaintiffs, the plaintiffs filed a document titled “consent to file suit.” It is a strange document which I find no place in the rules. Nevertheless, it says that some persons have authorized the 10 disclosed plaintiffs to file suit on their behalf as a representative suit. That document does not override the provisions of Order 4 Rule 1 (1) (b). In other words, I reiterate that the names of the plaintiffs must be disclosed in the plaint. Even if I am to assume that the attached document shows the other plaintiffs, I would still disregard the document. The plaint says that it is filed by the 10 disclosed persons and 404 others. The document attached has two sets of names, one with 227 names, and the second with 193 names. If I add these, I get 420 persons. This is certainly not the equivalent of 10 plus 404 others which would be 414 persons. Even if we are to say that the disclosed people have also signed the document, and we remove this number, that will give you 410 people, which is not the equivalent of 414 persons. Moreover, even within the list of 420, there are many of those names that bear no signatures and it cannot therefore be argued that these people have authorised the 10 disclosed plaintiffs to sue on their behalf.

14. One can of course file suit on behalf of people that he does not know, which would be a representative suit. But before doing so, the plaintiff must advertise the suit in terms of Order 1 Rule 8(2). However, this is not the case here. It is purported that the suit is filed on behalf of persons who are known and therefore their names must appear in the plaint in compliance with Order 4 Rule 1 (1) (b) as I have demonstrated above. If it is a representative suit where the names of all persons are not known, then there needs to be compliance with Order 1 Rule 8(2) and there has been no such compliance.

15. The importance of knowing which parties are suing cannot be overemphasised. In a private suit, it is only those who are within the suit

that are bound by the judgment. It is therefore of extreme importance for it to be clear who the parties in the suit are. I would venture to propose that in suits where there are many people, it is important that their identities be fully disclosed, by them producing copies of their identity cards, so that there is no room for ambiguity that one may not have been party, because names can be similar, which is exactly one of the arguments raised within this application.

16. I am not however prepared to hold that a prima facie case is displayed when it is not clear who the parties in the suit are, and that is precisely the situation in this suit.

(ii) Failure to demonstrate a cause of action

17. A prima facie case cannot be said to have been established if the cause of action is not clear. I have gone through the plaint and it is not clear to me what is the cause of action of the plaintiffs. If you want to know the cause of action, you look at the pleadings and the prayers. In this case, the first two prayers only seek declarations on legal provisions in a statute. The third prayer (c) is seeking an order of injunction against the defendants to stop them from dealing with the suit land. You can only ask for an injunction if you have a cause of action, i.e, a reason to stop the defendant from acting in a certain way, thus the prayer for injunction in itself is not a cause of action. Prayer (d) seeks a declaration that the plaintiffs have acquired title "by virtue of their long uninterrupted continuous occupation." I am not aware of any provision of law that gives title because one has been in "long uninterrupted continuous occupation." What I am aware of is that one may seek title by way of adverse possession and there are various elements that need to be proved. I have not seen any prayer in this suit which seeks an order that the plaintiffs have acquired title by dint of the doctrine of adverse possession. Without specifically seeking such prayer, and considering that this is not an Originating Summons pursuant to the provisions of Order 37 Rule 7, which is the procedure prescribed for filing suits for adverse possession, I am unable to import that this is a suit seeking a declaration of ownership through adverse possession. As I have said, I know no law which gives one title to land because of what is described here as "long uninterrupted continuous occupation." Prayer (e) seeks cancellation of title of the 1st defendant but this must be based on a known cause of action, which as I have taken time to demonstrate above, I do not see. Prayer (f) seeks subdivision of the land to the plaintiffs. At this point in time, I am not persuaded that this can be granted, first because it is not even clear who the plaintiffs are, and secondly, because there is not disclosed, in my view, a cause of action that would enable this prayer to be granted.

18. Given my above hypothesis, I am not persuaded, at this juncture of the proceedings, subject to being persuaded otherwise after hearing the case on merits, that the plaintiffs have demonstrated a cause of action against the defendants, which can lead me to the holding that they have shown a prima facie case with a probability of success.

(iii) Doubts on the factual basis of the case

19. In this case, the plaintiffs assert to be in possession of the suit land. I have none or very sketchy material before me, which would lead me to the prima facie conclusion that the plaintiffs are in actual occupation of the suit property. What the plaintiffs have provided are photographs, some awards from the National Land Commission (NLC), some lease agreements (including one where Luka Mulyanguku Masika is lessor), and a trade licence issued in the year 2008 to one Lucas Masika. The photographs are of a location that I am unable to tell. There is no affidavit by the one who took those photographs, and no surveyor's or other expert's report, which would inform me of the actual occupation on the ground by the plaintiffs. The awards of the NLC cannot help the plaintiffs, for if some of the plaintiffs were awarded money to vacate land so that a road may be made, I do not see on what basis they are still claiming the same land which must now be a road. The leases annexed do not show which particular land is leased and I cannot suppose that it is the suit land. That applies to the trade licence issued to Lucas Masika. In any event, the plaintiffs cannot rely on documents issued to Lucas Masika. I have not seen the name of Lucas Masika in the plaint or in the list of names attached to the purported consent to file suit. The name I see is Luka Mulyanguku Masika, and he has not even signed that list and cannot therefore be said to be a party in this suit. It doesn't help the plaintiffs to include his documents so as to prove their case.

(iv) Fact of judgment in favour of the 1st defendant

20. There is already a judgment in favour of the 1st defendant allowing the plaintiff to evict some persons from the suit land. The 1st defendant claims that some people who were in the previous suit are also purported to be plaintiffs in this case. The response by the plaintiffs is that this is not so. However, no affidavit has been filed sworn by Mutinda Ndolo, to deny that he was not among the defendants in the suit Mombasa HCCC No. 157 of 2007. In my view, it is not sufficient for Mr. Sita to merely say that he has spoken to Mr. Ndolo, and that Mr. Ndolo has denied that he was not a party in the previous suit. This is a situation which calls for that person to swear an affidavit to deny that he was not a party in the previous suit. That also applies to the person said by the 1st defendant to be Mary Wavinya Ndeti who the 1st defendant has zeroed on the name Mary Wavinya Nthenge in the list filed by the plaintiffs. That person ought to have sworn an affidavit so as to state that she is not the same as the person who was defendant in the previous suit.

21. Apart from the above, if the 1st defendant has judgment in her favour, she does not need to now go to the provisions of Sections 152A – 152I of the Land Act, 2012, and issue eviction notices to the persons named in that decree. This is a judgment that will be executed in the normal manner of executing decrees pursuant to the provisions of the Civil Procedure Act, Cap 21, Laws of Kenya.

22. For the above reasons, I am not persuaded that a prima facie case has been established. Since no prima facie case is established, I have no option but to dismiss this application with costs to the respondents.

23. The effect is that the plaintiffs will need to prove their case without the benefit of an order of injunction. The interim orders earlier issued are hereby vacated.

24. Orders accordingly.

DATED AND DELIVERED THIS 14TH DAY OF APRIL 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA