REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 77 OF 2010

ABUYA OMWERI……APPLICANT

-VERSUS-

KEIYAN GROUP RANCH……RESPONDENT

RULING

Abuya Omweri is the applicant whereas **Keiyan Group Ranch** is the respondent in the originating summons (O.S) dated 24th March, 2010 and filed in court the following day. In the O.S, the applicant wants to be declared the absolute owner of 10 acres or thereabouts of land parcel **no. Transmara/Keiyan/5** ***"the suit premises"*** by virtue of adverse possession. The applicant also prays that the respondent be ordered to execute all necessary documents for the transfer of 10 acres of the suit premises failing which the Deputy Registrar of this court should be authorized to do so. The applicant also prayed for an injunction as well as costs.

In support of the O.S, the applicant has deponed that sometimes in 1972 during land adjudication and registration, the respondent was registered as the proprietor of the suit premises measuring 816 Ha. Within the said suit premises are 10 acres approximately which the applicant occupies and utilizes the same to raise various perennial and annual crops. He has lived in that portion of the suit premises for well over 38 years. The said occupation has been open and uninterrupted from the respondent. That being the case he had acquired the said portion of the suit premises by virtue of adverse possession.

The O.S was served. Through **Francis Ole Nkanai**, the respondent filed a replying affidavit. He is the vice chairman of the respondent. In a nutshell, its defence is that the applicant has at no time resided adversely or at all on any portion of the suit premises. That in 2006, the applicant filed a suit against the respondent which suit was struck out. The instant suit was a mere after thought and is an attempt to disposses the respondent of its suit premises. Therefore the applicant's claim lacked merit, was un maintainable, an abuse of the court process and should be dismissed with costs.

On 25th October, 2010, the applicant filed an application under certificate of urgency seeking in the main that pending the hearing and determination of the O.S a temporary injunction do issue against the respondent, its agents, and servants restraining them from entering into, cultivating, harassing and or in any manner interfering with the 10 acres or thereabouts of the suit premises occupied by the applicant and or seizing the animals and or property of the applicant thereon. He also prayed for costs of the application.

The grounds in support of the application were that the applicant was in occupation of the portion

of the suit premises, the respondent had engaged in acts calculated to defeat the cause of justice and or interfere with the applicant's case and finally, the respondent would not suffer any prejudice if the application was granted.

In support of the application, the applicant swore an affidavit in which he repeated most of what he had deponed to in his earlier affidavit in support of the O.S. Suffice to add that, despite the pendency of this suit, the respondent through its agents or servants had continued to harass him and his family by taking possession of his animals on the suit premises and handing them over to the police station and or GSU camp within the Ranch. The actions of the respondent aforesaid were calculated to frustrate the applicant's possession of the portion of the suit premises which he had enjoyed all the years and also to defeat the cause of justice. He believed that since his case is one of adverse possession whose gist is peaceful, open and or uninterrupted occupation, it was in the interest of justice that the ***status quo*** prevailing at the time he filed the suit be maintained. Otherwise he would suffer a lot of prejudice and loss unless the application was granted.

In response, **Patrick Siparo**, the respondent's chairman swore a replying affidavit. He deponed where appropriate that the applicant did not reside on the portion of the suit premises. Instead he had attempted to trespass on the suit premises and had been repulsed by the respondent. Indeed he had been arrested and arraigned in court for trespass, breach of peace, illegal threats and stealing. The applicant had not tendered any evidence whatsoever to show that he resides on a portion of the suit premises. The suit premises is a group ranch and has never been a settlement scheme to warrant his residence therein. The applicant has been attempting to illegally graze his livestock in the suit premises leaving them with no option but to seek the intervention of the police to curb the menace, hence the claim of alleged harassment. What the applicant was attempting to do by the application was to legitimize his illegal acts of trespass, which will in turn result in massive crop losses to the farm thereby threatening the livelihood of the many families that constitute the respondent's group ranch. Since the applicant claims to be 77 years, he must have been present during the adjudication process that was completed in February, 1973. However, he did not file any objection to the adjudication process or make any other claim. From the foregoing it cannot be said that the applicant has been enjoying uninterrupted, peaceful enjoyment of the suit premises as he has been arrested and charged every time he has attempted to trespass on the suit premises. If the respondent is restrained from stopping the applicant's acts of trespass on the suit premises on which commercial crops are planted then the applicant will graze his animals on its commercial crops with impunity and the respondents will suffer irreparable loss and damages as a result. In the premises the applicant had not established a prima facie case with a high probability of success. In any event the balance of convenience tilted in favour of the respondent.

The application came up for interpartes hearing before me on 16th November, 2010. **Mr. Soire,** learned counsel for the applicant and **Mr. Mwangi** holding brief for **Mr. Kaakua** for respondent recorded a consent in terms that the application be canvassed by way of written submissions. Subsequently, parties filed and exchanged written submissions which I have carefully read and considered.

The dispute between the applicant and the respondent is based on adverse possession. Whereas the applicant claims to have been in possession of a portion of the suit premises measuring 10 acres or thereabouts belonging to the respondents for a period in excess of 12 years and he is therefore entitled to be registered as the proprietor thereof courtesy of **Limitation Of Actions Act**, the respondent on the other holds the view that the applicant had never occupied the portion claimed and if anything, he has been a trespasser and has constantly been repulsed by the respondent and its members and criminal cases preferred against him. Adverse possession is anchored on trespass. It obtains in a situation where a person enters another's parcel of land and remains therein for a period of 12 or so years enjoying possession and occupation freely and uninterrupted by the owner of the land. In other words the trespasser enters the parcel of land, remains on the same adverse to the interest of the owner and for 12 years or more, the owner of the land takes no steps to assert his title to the land by evicting the intruder. That is the essence of adverse possession. These are the issues that will be canvassed at the trial. A determination of the same cannot be made at this interlocutory stage. Yet reading through the replying affidavit of the respondent, that is what it is inviting this court to do. I must resist that temptation at this stage.

At this interlocutory stage, all that the applicant is required to demonstrate is that he has established a prima facie case with a probability of success, that unless the injunction is granted, he will suffer irreparable loss in capable of being compensated by an award of damages and that if the court is in doubt, it will make the order on the basis of balance of convenience. Above all interlocutory injunction it's a discretionary remedy, see **Giella –vs- Cassman Brown (1973) E.A. 538.**

Adverse possession is all about the number of years that the applicant may or may not have occupied the respondent's suit premises secondly, it is trite law that the respondent could assert its title to land by evicting the applicant in the event that he is in occupation or taking legal proceedings. Can the legal proceedings taken by the respondent against the applicant by preferring various criminal charges in the Senior Principal Magistrate's court be seen in that light. Perhaps; though I note that the names of those allegedly charged as aforesaid differ from the name of the applicant. On the basis of the foregoing, the substratum of the applicant's case will be seriously eroded and or destroyed unless the injunction sought is granted. As correctly observed by counsel for the applicant the reason probably why the respondent is keen not to have the order granted is because its moves are calculated or geared towards interfering with the applicant's evidence in support of his case.

In the O.S, the applicant has categorically deponed that he has been in occupation of a portion of the suit premises for over 12 years. For a claim based on adverse possession that is sufficient at this stage. The applicant need not bring further evidence to buttress that assertion as submitted by counsel for the respondent. Perhaps that may become necessary at the substantive hearing of the O.S. On the basis of the O.S, the supporting affidavit, replying affidavits and rival written submissions there are outstanding issues which must be resolved at the full trial. For now though, I am satisfied that the applicant has established a prima facie case with probability of success.

Again on the basis of the foregoing, I am satisfied that the applicant will suffer irreparable loss that cannot be compensated by an award of damages. If the injunction is not granted he and his family may be forced out of the portion of the suit premises if at all that they are in occupation and indications are that indeed they are in such occupation. No amount of damages would compensate such suffering. Finally, I think the balance of convenience tilts in favour of the applicant for the status quo obtaining at the time he lodged this suit on 25th march, 2010 being maintained.

The respondent has claimed that the suit premises is a commercial farm where cash crops such as sugar cane and tea are grown and livestock reared. It the injunction is granted, the court will be allowing the applicant to graze his animals on those crops thereby causing huge losses. This will be untenable as it will be a violation of the constitutional right of the respondent to the protection of property which this court should not countenance. First and foremost there is no prove of this assertion by the respondent. Secondly, it is possible to confine the activities of the applicant and his family within a radius of 10 acres and thirdly just like the respondent seeks solace within the constitution so is the applicant.

The respondent has also submitted that the orders sought will be cause grave injustice to the respondent as it would result in the applicant acting with impunity and will also be tantamount to injuncting the police or Government officers from acting on complaints on criminal acts and violation of the law against them. This submission is clearly speculative and courts of law do not act on speculation. In any event neither the police nor the Government are parties to the suit. Finally, if the applicant was to act in the manner speculated by the respondent, the doors of this court are open for appropriate remedy.

On the whole, the applicant has established a prima facie case with probability of success, that he will suffer irreparable loss and damage and that the balance of convenience heavily tilts in his favour. I would therefore grant prayer (c) and (d) of the application dated 21st October, 2010 on condition that the applicant executes an undertaking as to damages to the tune of Kshs. 500,000/= within the next seven (7) days from the date of this ruling.

Judgment dated, **signed** and **delivered** in court at Kisii 17th January, 2011.

ASIKE-MAKHANDIA
JUDGE