



**IN THE MATTER OF: A CLAIM FOR TITLE TO LAND UNDER SECTION 38 OF THE  
LIMITATION OF ACTIONS ACT, CAP 22 OF LAWS OF KENYA**

**SYMON GATUTU KIMAMO & 587 OTHERS ..... PLAINTIFFS /APPLICANTS**

**EAST AFRICAN PORTLAND CEMENT CO. LTD....DEFENDANT/RESPONDENT**

**RULING**

- 1.The application before the Court is one dated 11th November, 2011. It is a Notice of Motion (“Application”) seeking, in the main, that the Court “be pleased [to] grant an order of temporary injunction restraining [the] Defendant whether by itself, servants, agents, successor or assigns howsoever from entering, sub-diving and transacting in all that parcel of land known as 8784/4 (original No. 8784 I.R. 19637) East of Athi River, Machakos District (“Suit Property”).”
- 2.The Application also prays that the OCS, Athi River Police Station “do help in enforcing any orders of the Court” as well as a prayer that the costs of the Application be in the cause.
- 3.The Application is by the Plaintiffs in the Originating Summons of even date. That Originating Summons asks for a determination whether the Plaintiffs (all 588 of them, hereinafter, “Applicants”) have resided on the Suit Property for an uninterrupted period of over 12 years without the permission of the Defendant/Respondent (“hereinafter, “Respondent”) or at all as the registered owner thereof. It therefore asks that the Applicants be registered as the owners of the Suit Property.
- 4.The Application is supported by the Affidavit of the lead Plaintiff, Symon Gatutu Kimamo (hereinafter, “Mr. Kimamo”) which is sworn with the authorization and on behalf of all the other 586 Applicants.
- 5.The Application is vigorously opposed by the Respondent. It has filed a Replying Affidavit by its Legal Manager, Ms. Sheila Kahuki; Grounds of Opposition dated 2nd December, 2011; and a List of Authorities of even date.
- 6.The Application was certified as urgent by Justice M.S.A. Makhandia on 11th November, 2011. He declined to grant any relief *ex parte* (as asked in prayer 1 of the Application) and instead directed that the Application be served for *inter partes* hearing. The Application was eventually given a hearing date of 7th December, 2011. On that day, Mr. Anyoka appeared before me representing the Applicants and Mr. Koech appeared for the Respondent. After a brief discussion, both parties agreed to proceed by way of oral submissions before me.
- 7.It is now well established in Kenya that there are three main factors to be considered in determining whether to grant a preliminary injunction. (See *Giella v. Cassman Brown*). The trial court must evaluate whether:
  - a.The Applicant has showed that it is likely to prevail on the merits;

b.The Applicant has demonstrated that it will suffer imminent irreparable harm if the injunction is not granted; and

c.The harm the Applicant is likely to suffer absent the injunction outweighs the harm it would cause to the adverse party.

8.To these three factors, one might add another factor which a court is, at least, entitled to take into account after the first three: public interest. A temporary injunction will not normally issue if there will be harm to the public interest resulting from its issuance. Retired Justice Kuloba distilled these factors in his authoritative book on injunctions thus:

[T]he right formulation of [the principles] would be this, *that among other considerations a court takes into account* in determining whether a temporary injunction should be issued, first, whether there is a significant likelihood that the applicant will prevail on the merits of the case at a full trial. Second, the court will ordinarily consider whether there is a threat of irreparable harm. Finally, there is the traditional consideration of whether harm to the respondent would outweigh the need for temporary relief. But there may be other matters, for example public interest, involved. [Emphasis his]

9. In similar strain, Justice Musinga has explained that while the three-prong test in *Giella Case* is the fulcrum in our jurisprudence on interlocutory injunctions, the *Giella Principles* acquire a different hue when fundamental rights are involved. Justice Musinga put it this way in the *Satrose Ayuma & 11 Others v The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 Others* [2011] eKLR:

In an application for an interlocutory injunction to restrain breach of a fundamental right, the court may have to go beyond the ordinary tests as stated in *Giella v Cassman Brown Co. Ltd.* While the applicants must demonstrate that there has been breach or threatened reach of their Constitutional rights and thereby show that they have a *prima facie* case with a likelihood of success, the court has a duty to consider whether grant or denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of Rights. The court is enjoined to give an interpretation that promotes the values of a democratic society based on human dignity, equality, equity and freedom. Dignity of the people ought to be a core value in our Constitutional interpretation.

10.I understand this to mean that the *Giella Principles* must be applied in context, and they permit the consideration of important democratic and constitutional values and principles in their application. I will now apply the *Giella Principles* to the application at hand. In doing so, I have paused to first remind myself that at this stage in the proceedings I am not at liberty to make any conclusive findings of fact (or even law). That will have to await the complete compilation of the case record and full ventilation of the facts at trial which must include the cross examination of the witnesses. At this point, however, I must come to provisional conclusions which will allow me to determine if the injunctive relief sought is appropriate.

11.Have the Applicants shown that there is a significant likelihood that they will prevail on the merits of the case? To consider this crucial *Giella* factor, let's consider their theory of the case and the facts they have alleged to support it.

12.The Plaintiffs' theory of the case can be easily stated. They say they have been in occupation of the Suit Property for an uninterrupted period of over 12 years without the permission of the Respondent or at all. As such, the Applicants contend that they have acquired "legal, rightful, and lawful title/proprietorship" to the Suit Property as against the Respondent under Section 38 of the Limitations of Actions Act, Chapter 22 of the Laws of Kenya.

13.Section 38 of Limitations of Actions Act codifies the doctrine of Adverse Possession in Kenya. It provides:

Where a person claims to have become entitled by adverse possession to land registered under any of the

Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

14. It is the Applicants' case that they have been in possession of the Suit Property since at least 1994; that they have lived there for a continuous, open, and uninterrupted period exceeding twelve years. As such, they have acquired an "overriding interest" over the Suit Property by operation of law. Differently put, the Applicants claim the Suit Property under the doctrine of Adverse Possession.

15. Adverse possession has been defined to mean "possession inconsistent with the title of the owner. But not for instance possession under licence from the owner or by way of trust on his behalf. There must be denial of the owner's title in one form or another for possession to be adverse." (*Mutiso v Mutiso* [1998] LLR 3268 (CAK))

16. Adverse Possession is a question of fact. Possession is hostile if it is open, without right, without force or fraud, and exclusive. To establish ownership by adverse possession, the disseisor, the person seeking title, must prove the elements of adverse possession by clear and convincing evidence. This higher standard of proof reflects the fact that "Adverse possession" is an extraordinary doctrine which permits one to achieve ownership of another's property by operation of law; accordingly, the grant of this extraordinary privilege should be based upon clear evidence.

17. What evidence is available to show that the Applicants' have been in actual, open, hostile, exclusive, and continuous possession for the statutory period of 12 years or more? For one, the Applicants depose so in affidavit of Mr. Kimamo, who has been authorized by the 587 other Applicants to swear the affidavit on their behalf. Second, the Applicants have also annexed a series of eight pictures taken recently which show various structures in various stages of demolition. The pictures are meant to press the Applicants' case of the imminence of irreparable harm if an interlocutory injunction is not granted.

18. There is no dispute that the Respondent is the registered owner of the Suit Property. There is no dispute there have been people who, at least at some point, settled on the Suit Property without the consent or permission of the Respondent (See paragraphs 7-9 of the Affidavit of Ms. Sheila Kahuki). What is in dispute is for how long they have been in possession of the Suit Property, and in particular, whether that period is sufficient to constitute the 12 year statutory period. It is up to the Applicants to prove that – and, at this stage, they must demonstrate to the Court that they have a prima facie case with a probability of success on the merits. The Applicants are obligated to place enough materials before the Court to permit the Court to make the provisional conclusion that they have been in open, uninterrupted, hostile possession of the Suit Property.

19. This is a fact-intensive inquiry. The Applicants must demonstrate to the Court, using legally admissible modes of evidence, that they were in actual, continuous possession of the property for the requisite number of years, and that the possession was exclusive, adverse or hostile, and open and notorious.

20. To meet this burden, the Applicants have filed the Affidavit of Mr. Kimamo and its annexures. On the crucial question of possession, that affidavit dedicates all of three short paragraphs. I will re-produce them here in their entirety. Mr. Kimamo deposes:

THAT I took possession of the [Suit Property] sometime in the year 1994... and upon taking possession of the Suit Property I constructed my home in (sic) and I have lived openly, continuously and without interruption with my family of two (2) children to date.

THAT I am informed by the other Plaintiffs and I verily believe the same to be true and correct that [the other Applicants] took possession of the [Suit Property] in 1994.... I am also aware that the other Plaintiffs have been living and continue to live on the [Suit Property] with their families to date.

That I and other Plaintiffs have lived in the Suit Property for a continuous, open and uninterrupted period

exceeding twelve years.

21. On the contrary, the Respondent categorically denies that the Applicants have been in actual possession of the Suit Property for a period of more than twelve years. In material part, Ms. Kahuki depones:

THAT it is not true that the Applicants have been in occupation of the [Suit Property] since 1994 as alleged in the Affidavit of Simon Gitutu. On the contrary, the property has been vacant and has been used by the Respondent for quarrying until sometime in the year 2010 when we noticed that some persons were encroaching on the land.

THAT when we noticed the encroachers we published caveats in the daily newspapers warning the entire public that the land is the property of the Respondent.....

THAT the [Suit Property] is presently vacant and neither the Plaintiffs/Applicants nor anyone else is currently residing on the land.

In response to paragraph 5 of the Affidavit sworn by Simon Gatutu Kimamo, I would like to state that it is not true that the Plaintiffs/Applicants have been staying on the Suit Property for a continuous and uninterrupted period of 12 years. On the contrary, the Respondent has always attempted to remove persons who have been encroaching on the [Suit Property].

22. In the face of these dueling factual accounts, can the Applicants be said to have established a *prima facie* case with a probability of success? The Respondent responds in the negative and unleashes at least four shots to vindicate its position.

23. First, the Respondent, as provided above, rejects the Applicants' factual account. It is simply not true, the Respondent urges, that the Applicants have had actual, uninterrupted possession of the Suit Property for more than twelve years. As this is the hinge upon which my determination of the present Application lies, I will bracket this discussion and return to it shortly.

24. Second, the Respondent argues that the Application is untenable as the main suit is defective for offending the mandatory requirements of Order 37, Rule 7 of the Civil Procedure Rules. The complaint here is that the cited Rule requires that an application under section 38 of the Statute of Limitations (such as this one) must be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. Yet, the affidavit of Mr. Kimamo did not annex the certified extract of the title. Instead, it annexed what it describes as a copy of the title which turns out not be the correct copy. The Respondent demonstrates the failure of the Applicants to annex the proper certified copy extract of the title to the Suit Property by annexing it itself in paragraph 4 of Ms. Kahuki's affidavit. The Respondent relies primarily on *Kweyu v. Omutu* (1990) KLR 709 and its progeny for the position that an Originating Summons claiming adverse possession is fatally defective if a certified extract of the title is not annexed.

25. The Applicants' counsel, Mr. Anyoka, sought to neutralize this line of attack with three responses: First, he appealed to the Oxygen Principles and urged the Court not to dismiss an otherwise meritorious claim merely because it is technically deficient. Second, in buttressing his first response, he pointed out that the failure to attach the Certified extract of the title was not due to willful or negligent failure to follow procedure but because the Applicants could not trace the relevant file in the Lands registry despite their best efforts. In any event, Mr. Anyoka, argues the failure to attach the certified extract of the title has occasioned no prejudice to the Respondent. He therefore urges that the Court considers the case on its merits: the Applicants should not be prevented from having their day in Court because of the failure or mistake of the lands registry.

26. The relevant passage in *Kweyu v Omutu* which was relied on by Mr. Koech for the Respondent for the argument that the requirements of Order 37, Rule 8 is mandatory and failure to comply with it makes an Originating Summons under section 38 of the Limitations of Actions Act unsustainable reads as follows:

As I said at the beginning of this judgment, the appellant's supporting affidavit to his Originating Summons did not have annexed to it a certified extract of the title to the parcel of land out of which the suit land was claimed. *Save what the parties deponed to in their respective affidavits and the oral evidence before the superior court, the certainty of the existence and proprietorship of the suit land could not otherwise be guaranteed.* An order under section 38(1) of the Act was not therefore capable of being made. (Emphasis mine).

27. Reading this passage in *Kweyu v Omutu* in context, I do not believe that the Court of Appeal was making a categorical and formalistic requirement that a failure to attach the certified extract of the title ineluctably dooms a suit for adverse possession. The italicized words above indicate that the Court of Appeal had in mind the policy objectives of the rule itself, to wit, the desirability of establishing with certainty both the existence and proprietorship of the suit land before an order under section 38(1) issues. To my mind, the idea was never to simply require a certified extract of the title as a formalistic or talismanic hoop to be jumped by an intended disseisor for the sake of it. The objective was to provide a means for the Court to be certain about the existence and proprietorship of the suit land.

28. In this case, the certainty of both the existence and proprietorship of the Suit Property is not in dispute. In fact, the Respondent itself has attached a certified extract of the title. In my view, its formalistic insistence that the suit is defective simply because the certified extract of the title is not attached to the affidavit of the Plaintiff but that of the Respondent is elevating technical requirements above the need to determine cases based on substantive merit contrary to the Constitutional instructions in sections 22 (3)(d) and 159(2)(d) as well as the Oxygen Principles. I therefore refuse to reject the Applicants' suit simply on this basis. In doing so, I have taken into consideration both the all-too-often situation where a file in the lands registry goes missing. It would be absurd to punish an intended disseisor in that situation for the fault of the land registry – especially where they have employed their best efforts to get a copy of the title but were unable to do so.

29. Third, the Respondent argues that the suit is bad in law because the Respondent is owned to the tune of 25.3% of its shares by the Government of Kenya. As such, the Respondent argues, the suit offends the provisions of section 41(a)(i) of the Limitations of Actions Act. That section expressly prohibits anyone from claiming adverse possession of land owned by the government or land which is otherwise enjoyed by the government. The Respondent raise the argument that by virtue of the government's ownership of 25.3% of the shares of the Respondent, the Suit Property is brought within the provisions of section 41(a)(i).

30. The Applicants, on their part, deny that the Suit Property comes within the provisions of section 41(a)(i) of the Limitations of Actions Act. Mr. Anyoka pointed out that the Respondent is not a state corporation within the terms of State Corporations Act. Indeed, Mr. Anyoka reminded the Court, that the Respondent is registered under the Companies Act, Chapter 486 of the Laws of Kenya. That the Government is entitled under the internal corporate documents of the Respondent to appoint the Managing Director of the Respondent or even have control of the Board of Directors does not transform it into a government agency or a state corporation, and thereby get the protections afforded to public lands under section 41(a)(i) of the Limitations of Actions Act.

31. With respect, I do not think its lands are protected by section 41(a)(i) as government land or "land which is otherwise enjoyed by the government." I reach this conclusion for two separate reasons. First, while the ownership of 25.3% of the shares of the Respondent is significant corporate ownership, without more, it is not enough to warrant the conclusion that the Respondent's lands should be protected under section 41(a)(i). While unlike Mr Anyoka's contention, I do not hold that the regime under which the Respondent is registered is determinative of the question, here I do not think there is enough to make the determination that the Suit Property is government land.

32. I think it is important but not necessarily dispositive that the Respondent is registered under the regular Companies Act regime. There must be a reason why the Government of Kenya as well as the other shareholders chose to have the Respondent operate under the Companies Act despite the Government's ownership of significant shares in the Respondent company. One obvious reason, is of course, that it is

thought that it serves certain important functions for the Respondent to operate as any other economic actor in the market place. In that case, it would be akin to letting the Respondent have its cake and eat it too to allow it, for certain purposes to treat itself as a private entity in the market place, while at other times to insulate itself as a governmental entity.

33. Still, this formal test would not, to my mind, dispose off the question. In international law, for purposes of act of state doctrine, the formal nature of the company is not determinative of the question whether the acts of the company are attributable to the state or not. Instead, most courts have come up with “functional” tests aimed at distinguishing when an entity claiming the protections normally available to sovereign states was acting primarily in its public or governmental capacity or whether it was acting predominantly as a commercial actor. For example, in the United States, under the restrictive theory of sovereign immunity, many courts consider the following five factors in making that determination:

- a. Was the entity in question created for a national purpose?
- b. Does the sovereign state supervise the entity?
- c. Does the state require the hiring of public employees and pays their salaries?
- d. Does the entity hold exclusive rights to some right in the country? And,
- e. How is the entity in question treated under the state law?

See, for example, *Ocean Line Holdings Ltd. v. China Nat’l Chartering Corp.*, 578 F. Supp. 2d 621, 624 (S.D.N.Y. 2008) and *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004)).

34. If we consider these factors as indicative of the kind of questions we need to ask to determine the issue at hand, I find that the Respondent has not put enough materials on the record to warrant a conclusion that it should be treated as sufficiently a governmental entity for its lands to be entitled to the protections afforded to public land under section 41(a)(i) of the Statute of Limitations.

35. First, there is no evidential proof or even allegation (other than the submissions of Mr. Koech from the bar, which cannot constitute evidence) that the Government of Kenya is the controlling majority in the Respondent Company. Mr. Koech invited the Court to take judicial notice of the fact that the Government of Kenya appoints the Managing Directors and most directors of the Respondent. I am afraid this is a poor substitute for offering proof on such an important issue and will not suffice here.

36. Second, there is no allegation or proof that the Respondent was created for a national purpose; or that the Government of Kenya supervises it. Similarly, there is no evidence that the Respondent’s employees are considered public employees. Finally, as Mr. Anyoka contended, it is significant that above all these, the Respondent does not operate under the State Corporations Act but it is instead registered under the Companies Act, Chapter 486, Laws of Kenya.

37. Third, we should view all these against the policy objective behind the rule that there can be no adverse possession against public land. The purpose of the statute providing that nothing contained in any statute of limitations extends to any lands belonging to the state, is to protect against the loss of public lands due to the carelessness or oversight of the people charged with protecting the public’s interests. I do not think that objective applies to the Respondent which, in all aspects of its existence operates as a commercial actor not as a governmental entity exercising public power. It is therefore the conclusion of this Court that the Suit Property does not come within the protection of section 41(a)(i) of the Statute of Limitations.

38. The fourth legal ground raised by Mr. Koech is that the Application is bad in law because there is no prayer for permanent injunction in the Originating Summons on which it is predicated. Here, I believe Mr. Koech was relying on a line of cases which suggest that an interlocutory injunction cannot be granted where there is no relief in the nature of a permanent injunction prayed for in the main suit. See, for

example, *Southern Credit Banking Corp. Ltd V. Charles Wachina Ngundo* (Milimani HCC No. 1780 of 2000). I believe that stated this way the principle Ringera J. (as he then was) was enunciating is overbroad. Justice Ringera himself rendered the principle thus in the later case of *Dismas Oduor Oduor v. Housing Finance Company (K) Ltd and Another* (Miliman HCCC No. 630 of 2001):

The defendant's interlocutory application of 7<sup>th</sup> June 2001 is inconsistent with the prayers sought in the suit. Whereas in the suit he is seeking an injunction to restrain the sale of the charged property, in the application he is seeking to restrain the transfer of the said property to the auction purchaser and other consequential or subsequent dealings with the property. The Plaintiff, in my opinion, cannot be granted interlocutory orders, which are at variance with the permanent orders sought. I think he goofed in not amending his plaint before amending the chamber summons. He could not be allowed to injunct a transfer by the chargee to the auction purchaser without amending his plaint to challenge the auction sale complained of. And although the court has power to nullify a sale if fraud is proved, I do not think it can do so in an interlocutory application wherein the purchaser is not even a party.

39. In my view, this is not a blanket rule that an application for temporary injunction is incompetent as long as the Plaint or other originating pleading in the main suit does not contain a predicating permanent injunction in the same terms as those prayed temporarily. That requirement does not appear anywhere in Order 40, Rules 1 and 2. It is also not the principle Justice Ringera enunciated in this later case. The rule that emerges in the *Dismas Oduor Oduor Case* is that an interlocutory injunction cannot be granted if the orders sought are at variance with the permanent orders sought.

40. This is trite law. But it does not acquit Mr. Koeh's position. There is nothing inconsistent between the interlocutory orders for injunction sought by the Applicants herein with the permanent order for declaration and registration of title sought in the Originating Summons. Properly stated as such, the principle enunciated by Justice Ringera in the *Dismas Oduor Oduor* case and its progeny does not render the present Application incompetent or bad in law. See, also, *Laxmanbhai Construction v. Anspar Beverages Ltd* (Nairobi Milimani HCCC No. 1327 of 2001).

41. Having dealt with all the technical legal objections to the Application in a manner favorable to the Applicants, we now return to the substantive factual question presented by the present Application. Can it be said here that the Applicants have demonstrated that they have a prima facie case with a probability of succeeding on the merits?

42. Unfortunately for the Applicants, I have come to the conclusion that on the record available, I cannot say that they are likely to succeed on the merits. All we have on record on the crucial question of whether they were in actual, continuous possession of the property for the requisite number of years, and whether that the possession was exclusive, adverse or hostile, and open and notorious, is an affidavit of the Lead Applicant with bald allegations and a series of eight pictures. The bare allegations of Mr. Kimamo claiming actual possession for more than twelve years are met with similar claims in the affidavit of Ms. Kahuki denying exclusive possession by the Applicants.

43. The Applicants have placed very scant other information on record to warrant a conclusion, even a provisional one, they are likely to persuade the Trial Court that they have been in possession of the Suit Property adverse to the Respondent for more than twelve years.

44. In *Situma v Cherono* (Civil Appeal No. 351 of 2002), the Court of Appeal, citing the English case of *Japye (Oxford) Ltd v. Graham* [2003] 1AC 419, had this to say:

For [the Plaintiff's suit to] succeed he must not only prove exclusive physical possession of an identifiable portion of the suit land independent of possession by his deceased father but also requisite intention (*animus possidendi*) to the exclusion the world at large including the respondent.

45. Here, the Applicants have hardly alleged let alone proved exclusive physical possession of the Suit Property. At the end of the day, the Court is left with the dueling affidavits of Mr. Kimamo and Ms. Kahuki. In the circumstances, I take cue from *Royal Media Services Ltd v. Telekom Kenya Ltd and*

*Others* (Nairobi Milimani HCCC No. 13 of 2000) where the Court citing the English case of *R v. Fulham Tribunal ex parte Zerek* [1951] 2 KB 1, said that where a dispute turns on a question of fact about which there is a conflict of evidence the Courts will genuinely decline to interfere by issuing an injunction and thus leave the matter to be determined through a hearing by evidence.

46. My view of whether the Applicants will prevail on merit is, ironically, influenced by the series of eight pictures which the Applicants have annexed to the affidavit of Mr. Kimamo. In my view, a close look at these pictures detract from the Applicants' case on the crucial question of the period within which they have been in actual, open, hostile, exclusive and continuous possession of the Suit Property. This is because, even to my untrained eye, the pictures betray structures that are hardly two years old let alone seventeen as they claim in their pleadings. While the Applicants' claim to have been in the Suit Property for more than seventeen years (since 1994) and to have planted indigenous trees, structures, toilets, crops and other developments etc on the Suit Property, none of the pictures presented tell any such story. The yards of the houses in the pictures also belie the notion that it has been lived on for more than 12 years.

47. For the Applicants to demonstrate that they will succeed on merit, more would be required to show that the elements of adverse possession will likely be satisfied. I am not prepared, at this point, to make even a tentative conclusion that they will establish the elements of adverse possession on trial. As aforesaid, adverse possession is an extraordinary doctrine which permits one to achieve ownership of another's property by operation of law; accordingly, the grant of this extraordinary privilege should be based upon clear evidence. Because I cannot, at this point in the proceedings, see any clear evidence on the crucial elements of actual, open and hostile possession, I decline to make a finding that the Applicants have established a *prima facie* case with a probability of success.

48. Having concluded that the Applicants will have difficulties succeeding on the merits, their quest for injunctive relief comes to an end at this point. I am not required to proceed further with analysis of the other two *Giella* factors. Were I to reach the issue, I would have been similarly torn on the question of irreparable damage. This is because there is conflicting evidence whether the Applicants are presently in possession of the Suit Property: the Applicants say they are, stating that they successfully repulsed the "hired goons" who invaded their village trying to evict them – but the series of pictures they have presented to the Court hardly present a picture of a vibrant urban village. Instead, the pictures paint a picture of a successful eviction operation – which would mean that the eviction is already complete and any possession has already been fractured. At the same time, I would be wary of rewarding the Respondent simply because it was quick to evict the Applicants before they could secure injunctive relief.

49. I would also have resolved the balance of convenience in favor of the Applicants owing to the nature of the dire circumstances the decline of an injunction would mean for them. However, my conclusion at this point that the Applicants are unlikely to succeed on the merits obviates this analysis.

50. I should pause long enough to share that I have reached my conclusions above, to use the words of Apolloo J.A. (as he then was) "without relish" (*Rioki Estates Ltd v Njoroge* (1977)). In all my analysis above, one thing is clear: this has been presented both on the pleadings and by the necessity of the nature of the interlocutory orders being sought, as a case of adverse possession. This was never a case about the forced evictions of the Applicants. There are references to evictions executed by "hired goons" and a list allegedly left behind by the fleeing "hired goons" is annexed to the Affidavit of Mr. Kimamo. The Respondent denies using any such goons and claims it is a stranger to the document attached by Mr. Kimamo. I will pause long enough to say that, if true, these are serious allegations. There isn't, unfortunately, enough on the record for the Court to take up this claim at this point. Not enough has been pleaded by either party to warrant the Court to make even tentative conclusions on the issue.

51. It is appropriate, however, to make the following observations. Forced evictions are illegal under our laws, and especially, under our Constitution. It matters not whether one has title to the property in question. It matters not that the title holder is the government or a government entity. It matters not if the title holder believes the intended evictee is a trespasser who has no colour of title. Indeed, the prohibition against Forced Evictions applies with stronger force against the government. This is the position under

our own municipal law as well as the position under international law – which is now part of our law under Article 2(5) and 2(6) of our Constitution.

52.To clarify, the prohibition against Forced Eviction does not imply that persons can settle on whatever land they wish and plead prohibition against Forced Eviction in reply to entreaties to leave. Eviction is permitted if carried out in accordance with the law. As the General Comment 7 on the Right to Adequate Housing (Article 11.1 of the Covenant on Economic, Social and Cultural Rights states: The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Human Rights Covenants. See *CESCR, General Comment No. 7, The Right to Adequate Housing (Art. 11.1 of the Covenant): Forced Evictions*, U.N. Doc. E/C.12/1997/4 (1997) at paragraph 3.

53.It therefore bears to define Forced Evictions. We find the General Comment useful in this regard as well:

The term "forced evictions" ... is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.

General Comment No. 7 at paragraph 3.

54.Thus the prohibition against Forced Evictions applies notwithstanding the underlying substantive right claimed by the intended evictee. It is, in essence, a due process right; yet one with substantive bite. As General Comment No. 7 referred to above provides in paragraphs 15-17:

15. In cases where eviction is considered to be justified, it should be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality. In this regard it is especially pertinent to recall General Comment 16 by the Human Rights Committee, relating to Article 17 of the International Covenant on Civil and Political Rights, which states that interference with a person's home can only take place "in cases envisaged by the law". The Committee observed that the law "should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances". The Committee also indicated that "relevant legislation must specify in details the precise circumstances in which such interferences may be permitted".

16. Appropriate procedural protection and due process are essential aspects of all human rights but it is especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognised in both International Human Rights Covenants. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions and where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

17. Evictions should not result in rendering individuals homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.

55.I only raise this issue to give an indication that the Courts will take seriously efforts to forcefully evict individuals from their homes without the benefit of procedural due process even where it is claimed that is being done in the general public interest or in pursuant to another constitutionally protected right or

entitlement. Our Constitution, in keeping with international best practices, envisages an orderly process for determination and enforcement of competing constitutional values and objectives.

56. In the ultimate analysis, though, I have declined to grant the injunctive relief sought by the Applicants and I dismiss the Application dated 11th November, 2011. Due to some of the issues I have raised in this ruling, I will make the further order that costs of this Application be in the cause.

**DATED AT SEATTLE, WASHINGTON, U.S.A. THIS 14TH DAY OF DECEMBER, 2011**

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**J.M. NGUGI**

**JUDGE**

**DELIVERED AT MACHAKOS THIS 16<sup>TH</sup> DAY OF DECEMBER, 2011**

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**G.M. DULU**

**JUDGE**