



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 142 OF 2010 (O.S.)

IN THE MATTER OF: THE REGISTERED LANDS ACT (CAP 300)
LAWS OF KENYA REGISTRATION OF TITLES
ACT (CAP 281) LAWS OF KENYA
AND

IN THE MATTER OF: FREEHOLD INTEREST IN PARCEL OF LAND/ PLOT NUMBER
232/2/II/M.N. CR. 18466

AND

IN THE MATTER OF: LIMITATION OF ACTION (CAP. 22) LAWS OF KENYA

BETWEEN

- 1. MOHAMED HAMISI BAMAMA**
- 2. SALMA KIBWANA**
- 3. ISAACK O. OBEYA**
- 4. KENGA KALUME KARISA**

5. JOHN YAA (suing on their own behalf and on behalf of other 204 residents of plot No. 232/2/II/M.N.....PLAINTIFF/APPLICANT

VERSUS

TRADE PLUS INTERNATIONAL LIMITED
.....DEFENDANTS/RESPONDENTS

R U L I N G

The five (5) plaintiffs on 7th May, 2010 filed a Chamber Summons seeking the leave of this court to institute proceedings by way of Originating Summons on their own behalf and on behalf of the two hundred and four others under the provisions of inter alia, Section 37 and 38 of the Limitations of Action Act chapter 22, Laws of Kenya and Order 36, rule 3 D of the Civil Procedure Act against the Defendant, a Limited Liability Company.

The 5 plaintiffs are:-

1. Mohamed Hamisi Ramama
2. Salma Kibwana

3. Isaack O. Obeya
4. Kenga Kalume Karisa
5. John Yaa (suing on their own behalf and on behalf of the other 204 residents of Plot No. 233/2/II/MN).

The Defendant is M/s Trade Plus International Limited a Limited Liability Company. The plaintiffs who claim to have become entitled by adverse possession of 15 acres out of all that piece and parcel of land comprised in the freehold title No. CR 18466 Registered in the Lands registry Mombasa measuring 31.71 Hectare (approximately 80 acres or thereabout) seek from the court the determination of the following questions:-

1. Have the plaintiffs been in uninterrupted, continuous and peaceful occupation and/or possession of the suit property for more than twelve years.
2. Are the plaintiffs entitled to 15 acres by way of adverse possession out of the 80 acres or thereabout of the suit property in the name of TRADE PLUS INTENRATIONAL LIMITED?
3. Whether the possession and occupation by the plaintiffs of the suit property constitute overriding interest in terms of the provisions of Section 30 of the Registered land Act Cap 300, Laws of Kenya.
4. Whether damages are adequate remedies to the plaintiffs and/or whether compensation to the plaintiffs by the Defendant is a viable remedy.
5. Are the plaintiffs entitled to be registered as owners of 15 acres out of 80 acres or thereabout in the name of the Defendant?
6. Whether a permanent injunction order be issued against the defendant by itself, servants, agents or authorized independent contractors not to demolish or destroy the plaintiffs houses built on the suit property or evict the plaintiffs from the suit land?
7. Are the plaintiffs entitled to costs of the suit?

And the plaintiff prayed for the following orders:-

(i) *That the plaintiffs be registered as proprietors in common of 15 acres portion of land comprised in the Title CR. 18466 registered in the Land Registry as Parcel No.232/2/II/M.N. being 80 acres or thereabout in the name of TRADE PLUS INTERNATIONAL LIMITED.*

(ii) *That the defendant, its servants, directors, agents and/or any other authorized independent contractor be restrained by a permanent injunction from entering the suit land or parcel No. 232/2/II/M.N. or demolishing the Plaintiffs' houses, structures and/or properties thereon and/or evicting the plaintiffs their families and/or tenants or in any manner whatsoever interfering with the plaintiffs' peaceful occupation and enjoyment of the suit land.*

(iii) *That costs of the application be provided for.*

The Originating Summons dated 6th May, 2010 is supported by an affidavit sworn by Mohamed Hamisi Bamama on 6th May, 2010 with the authority of the other plaintiffs.

This court granted leave on the same day for the filing of the aforesaid originating summons. The plaintiffs on 14th June 2010 duly filed the Originating summons now dated June 2010 in pursuance of the leave granted by the court on 7th May 2010.

On 1st October 2010 the plaintiffs filed an application for leave to serve the Defendants with the Originating Summons by way of substituted service by advertisement in the daily newspapers having

been unable to serve the summons and not having the address of the Defendants, postal and physical. The application was fixed for hearing on 25.10.2010.

Before the said date, the plaintiffs rushed back to court on 22nd October, 2010 and filed a Chamber Summons of the same date under certificate of urgency seeking the following orders:-

“1. _____

2. THAT a temporary injunction do issue restraining the defendant through themselves and/or their servants and/or their employees and/or their agents or whosoever acting on their behalf from evicting, further demolition and/or harassing the plaintiffs and/or interfering with the plaintiffs ownership of the 15 acres of the undivided portion of plot No. 232/2/II/M.N. in Kisauni, pending the hearing and determination of the Originating Summons.

3. THAT a temporary injunction do issue restraining the defendants through themselves and/or their servants and/or their employees, and/or agents or whosoever acting on their behalf from evicting, further demolition and/or harassing the plaintiffs and/or interfering with the plaintiffs ownership of the 15 acres of the undivided portion of Plot No. 232/2/II/MN in Kisauni, pending and determination of this suit.

4. THAT cost of this application be provided.

The grounds on which the application is based are that:-

1. That the Defendant moved on Plot No.232/2/II/MN on the 18th October 2010 and demolished the structures of the plaintiffs with the help of the Provincial Administration.
2. That the plaintiffs are now sleeping in the cold together with their families as they have nowhere to go.
3. That the plaintiffs had already filed Originating Summons in the High Court for adverse possession of the parcel of land which they are occupying.
4. That the plaintiffs are apprehensive that the defendant now intends to completely dispossess them of the area they are occupying and in essence frustrate the Originating Summons they had filed in the high court.
5. That it is now important that the Honourable court do come to the aid of the plaintiffs and stop further destruction and harassment of the plaintiffs.

The application is supported by an affidavit sworn by Mohammed Hamisi Bamama sworn on 22nd October 2010. In the said affidavit it is deponed as follows:-

“.....
.....

- 1. THAT I am the 1st plaintiff/Applicant herein and have authority from the other plaintiffs herein to swear this affidavit on my own behalf and on behalf of the said plaintiffs/Applicants.**
- 2. THAT I and the other plaintiffs are residents on a portion of land measuring 15 acres of Plot No. 232/2/II/MN and CR. No. 18466 for over 12 years and we continue to reside on the said plot peacefully and uninterrupted for over 12 years.**
- 3. THAT I and the other plaintiffs filed an Originating Summons on 14th June 2010 claiming**

adverse possession over 15 acres of Plot No. 232/2/II/MN and CR No. 18466 within Kisauni.

4. THAT since the filing of the Originating Summons I and the other plaintiffs have made all efforts to serve the defendant with the Originating Summons but to no avail.

5. THAT all the efforts to trace the physical address of the Defendant TRADE PLUS INTERNATIONAL LIMITED from the Registrar of Companies in Nairobi did not bear any fruit as no records of the company were available so as to enable us to know the Directors of the Defendant company, company and their physical address.

6. THAT since I and the other plaintiffs were unable to locate the physical address of the Defendant and the efforts to obtain the names of the directors of the company were futile, our advocates advised us to make an application for substituted service which said application was coming up for hearing on 25th October 2010.

7. THAT on the 18th October 2010 without any notice and at around 6.00 a.m. the defendant moved on the parcel of land, I and the other plaintiffs were occupying and using a Bulldozer and the Provincial Administration Officers, started demolishing our homes to the ground (hereto annexed and marked as "MHB 2" is the scanned photographs evidencing the massive destruction.

8. THAT I and the other plaintiffs are fighting an invisible defendant who cannot be found but who can strike at will and finish us.

9. THAT I and the other plaintiffs are apprehensive that without the courts order we shall now be driven out of the parcel of land which we occupy after the evidence of our occupation is destroyed and a perimeter wall constructed.

10. THAT I and the other plaintiffs are now sleeping in the cold and can be driven out of our ancestral land anytime using the might of the Provincial Administration after the demolition of our homes by the Defendant.

11. THAT I and the other plaintiffs now pray to the Honourable court for an injunctive relief barring the defendant from further interfering with our parcel of land until the hearing and determination of our Originating Summons which we had earlier filed in the Honourable court.

12. THAT the Defendant herein has commenced construction of a perimeter wall around the suit property and the plaintiffs are apprehensive that they shall be locked inside the perimeter wall and then squeezed out of the premises.

13. THAT I and the other plaintiffs now pray to this Honourable court to issue injunctive orders against the defendants to protect us from destruction.

Upon hearing the plaintiffs on the said application Ex parte on 22nd October 2010 under certificate of Urgency, this court granted Interim Temporary Injunction Orders in terms of Prayer 2 of the application. The court further ordered that the police and the Municipal Council of Mombasa to cease any further eviction, demolition and/or involvement in respect of the suit property. The court directed that the said application be heard inter parties on 4th November 2010.

Before the said date of 4th November 2010 was reached and the application heard on inter partes and on merit the Defendant moved the court under certificate of urgency when it filed a Chamber Summons on 25th October 2010 under the provisions of Order 39, Rule 4 of the Civil Procedure Rules inter alia on orders that:-

"That the Honourable Court's orders dated 22nd October 2010 by the Honourable Justice Ibrahim pertaining to Plot No. 232/2/II/MN in Mishomoroni Mombasa be discharged, varied and/or set

aside.“

The said application supported by an affidavit by the Managing Director of the defendant Company, Mohamed Ibrahim Abdi, sworn on 21st October 2010. The grounds on which the application is based are that:-

- (a) The Defendant/applicant herein is the registered proprietor of the property known as plot No. 232/2/II/MN in Mishomoroni Mombasa which is the subject matter of the suit.
- (b) That the Defendant/Applicant legally purchased it from the Kenya Ports Authority Pension Scheme in March 2010.
- (c) That the Defendant/Applicant is aggrieved with the Order of temporary injunction issued against it on the 22nd October 2010.
- (d) That the Defendant/applicant with the intention of developing the property requested for the assistance of the Municipal council of Mombasa to remove squatters who were hampering the efforts of the Defendant/Applicant to develop a modern housing on the property.
- (e) That the Council issued a Notice to the squatters and the Defendant/Applicant to demolish the structures on the property because they were developed in contravention of the physical planning Act and the council by-laws.
- (f) That the council thereafter pursuant to a court order dated 12th October 2010 demolished the illegal structures on the defendant/Applicant's property and the said court order was fully satisfied and written compliance by the Town Clerk was returned to the court. That no appeal has been preferred against the order and therefore it is still legally effective.
- (g) That on the 22nd October 2010 at around 6 p.m. security guards of the Defendant's/applicant's property were served with a court order restraining the Defendant/Applicant from evicting or further demolishing or harassing the plaintiffs. The said order was premised upon an application by way of Originating summons by the plaintiffs for adverse possession which the Defendant/Applicant was never aware of and which was never served on them.
- (h) That by the time the Honourable court's restraining Orders were issued the plaintiffs were already evicted and their structures demolished by Mombasa Municipal Council.
- (i) That the plaintiffs and others who are being incited by politicians are now using the Honourable court's orders to invade and enter upon the defendant's/Applicant's property and have attempted to erect illegal structures and disposes the defendant/applicant of their property.
- (j) That unless the Honourable court's Orders which were obtained by misleading the Honourable court and withholding material facts are discharged, set aside and/or vacated the Defendant's/Applicant's property is under threat of illegal occupation by the plaintiffs and other persons who are misusing/abusing the Honourable court's restraining orders dated 22nd October against the Defendant/applicant.
- (k) That it is in the Interest of justice that the orders sought herein are granted.

The Defendant/Applicant through its counsel appeared before this court on 25/10/10 ex parte. The court was shown the letter by the Town Clerk of the Municipal council of Mombasa to the Resident Magistrate, Municipal Court, confirming that the structures on the premises had been demolished to the ground level in compliance of the said court's order given on 12th October 2010. This court was of the view that the position stated and given by the plaintiff on 22.10.2010 when they claimed that the process was not completed but partially carried out. The court made it clear that the ex parte temporary injunction order

was of a restraining nature and not a mandatory injunction order to reinstate anybody on the land. It was granted on the understanding that the eviction and demolition were not fully effected. This Court stated that the earlier orders given were *ex parte* and should not be used in a way that would give the plaintiff an unfair advantage or prejudice irreversibly the rights of the defendant.

However, the order made it clear that at the same time it would not allow any further eviction and/or demolition to take place until further orders of the court. The court then made the following orders on 25th October 2010.

“1. THAT the status quo prevailing on the ground on the suit premises today at 3.30 p.m. shall be maintained and preserved by ALL THE PARTIES to this suit and any one claiming under them pending the Inter partes hearing of the application.

2. THAT the parties shall respect and maintain the *de facto* position on the ground today until then.

3. THAT any party or other person who purports to change the existing position/situation today shall be held in contempt of this court order and will face the consequences thereof.

4. THAT the application shall be heard on 4th November 2010.

This meant that the Application by the plaintiffs/applicants dated 22nd October 2010 and that of the Defendant dated 25th October 2010 were to be heard on the same day on 4th November 2010.

On the 4th November 2010 both applications came for hearing for the first time, *inter partes*. Upon consideration of all matters, the court made the following orders in connection with both applications:-

“

1. THAT the two applications are hereby stood over to be set down for hearing on a date to be agreed upon mutually and subject to the court’s diary.

2. THAT the date may be fixed in court or at the Registry.

3. THAT the orders of this court granted on 22nd October, 2010 are hereby varied and the following orders are made in substitution thereof:-

i. THAT the orders granted to the defendant and made by this court on 25th October 2010 are hereby REITERATED, RE-ISSUED AND/OR EXTENDED to full order and shall be incorporated in the orders herein.

ii. THAT for the AVOIDANCE OF DOUBT the orders of 22nd October 2010 stand DISHCHARGED AND REPLACED with the orders of 25th October 2010.

iii. THAT the effect and meaning are that:-

(a) The Defendant is and has been restrained from carrying out any eviction and/or demolition of the suit property with effect from 22nd October 2010.

(b) Any plaintiff who was evicted from and whose premises had been demolished by 22nd October 2010 shall NOT purport to use or apply the court orders of 22nd October 2010 and any other date to re-enter or to return to the suit premises, build, erect or put up any new structures, building or development.

(c)The status quo prevailing on the ground on the suit premises 25th October, 2010 at 3.30 p.m. shall be maintained and preserved by ALL THE PARTIES in this suit and anyone claiming under them pending further orders of this court. IN ORDER TO MAINTAIN PEACE, SECURITY AND ENFORCEMENT OF THE LAW, I HEREBY ORDER AND DIRECT

1. That THE OFFICER IN CHARGE (O.C.S.) of the nearest police station to the suit premises and the O.C.P.D. of the area to ensure that THIS ORDER IS OBEYED AND COMPLIED WITH and there shall be no breach of the peace.

2. THAT there shall be no new executions or buildings of the suit premises whatsoever orders accordingly and

“BY CONSENT”

1. THAT the parties shall file and serve written submissions within the NEXT 14 days.

2. THAT Highlighting shall be on the 19th November 2010 at 11 a.m.”

The parties in compliance of the consent orders filed written submissions and counsel highlighted the same before me on 19.11.2010. ‘Mr’ Jumbale represented the plaintiffs while Mr. Garane represented the Defendant.

I have considered the two applications by the parties, the rival affidavits and the written submissions fortified by the oral highlighting by the Counsels on 19th November 2010.

The plaintiffs claim for an order that they are entitled to 15 acres by way of adverse possession out of the 80 acres or thereabout of the suit property registered in the names of the Defendant company. The main question to be determined by the court is:-

“Have the plaintiffs been in uninterrupted, continuous and peaceful occupation and/or possession of the suit property for more than 12 years?”

From the nature of a claim of Adverse Possession the plaintiffs must of essence prove from the outset that they are in actual exclusive possession of the 15 acres out of the suit property. Exclusive possession is the foundation for a claim of based on adverse possession. In the supporting affidavit by the plaintiffs the deponent states:-

“

1.

2. I am a resident of Junda, Mishomoroni, Kisauni and entered and established my homestead within Plot No. 232/2/II M.N. for the last 19 years doing fishing activities at the Junda Creek.

3. THAT myself with other fishermen dwelt, built houses and homesteads as the years went by without anybody’s permission or authority or being interrupted for all these years until 2010 and presently.

4. THAT I have a wife and have had six issues, the 1st born being 17 years known as Fatuma Mohamed and the last born being 7 years known as Hamisi Mohamed who were born and brought up on the suit premises and they do not know any other home other than plot No. 232/2/II/M.N.

5. THAT similarly, all other applicants have established their permanent residences as early as the 1980’s staying on plot No. 232/2/II/M.N. continuously, peacefully and uninterrupted from anybody and have never had any correspondence with the owner of the suit property except a letter

to the then registered owners Kenya Ports Authority, through the then area member of Parliament seeking some 3 acres for construction of a primary and secondary school in the year 2004.

6.

.....”

On the basis of the foregoing statement on oath the plaintiffs, at the

trial and for the purposes of the applications for temporary injunction pending the hearing of the suit, must of necessity establish and show that they were in occupation in the disputed portion of the suit property when they filed this suit and of critical importance that they were in such occupation on 22nd October 2010 when they presented their ex parte application and obtained the orders herein.

In their application with its supporting affidavit and the further affidavits, it is the defendants case that pursuant to a court order dated 12th October 2010 from the Municipal Court the Municipal Council of Mombasa demolished all the illegal structures on the suit property which belonged to the plaintiffs and that the said court order was fully enforced and sanctioned and the court duly informed of the same. This court was shown a copy of the court order issued by the Municipal court on 12th October 2010. It reads as follows:-

“

**REPUBLIC OF KENYA
IN THE RESIDENT MAGISTRATE’S COURT
AT MOMBASA
CRIMINAL CASE NO. M.4669/10**

MUNICIPALPROSECUTOR

VERSUS

MOHAMED IBRAHIM ABDI

**TRADE PLUS INTERNATIONAL LIMITEDACCUSED
IN OPEN COURT BEFORE HON. MICHIEKA (RM) ON 12TH OCTOBER 2010**

TO THE TOWN CLERK

MUNICIPAL COUNCIL OF MOMBASA

ORDER

You are hereby directed by this court through Inspectorate department to demolish the structures to the ground level as per the building notice standing on plot No. 232/2/II/M.N., Mishomoroni area, Mombasa within the Municipality developed without development authority from Municipal Council.

I further order the O.C.P.D. and the D.C. to provide security. Accused to pay for the necessary charges and costs.

A compliance report from the Municipal Planner to be produced to court on the mention date.

Matter will be mentioned on 19th October 2010 to ensure compliance.

ISSUED at Mombasa this 12th day of October 2010.

**RESIDENT MAGISTRATE
MUNICIPAL COURT**

The said court order contained a Penal Notice. The Defendant produced a letter from the Town Clerk dated 18th October 2010 to the Resident Magistrate, Municipal Court, Mombasa. This is the date that the demolition took place according to both parties. It is important to set out the contents of the letter as it referred to the compliance of the orders of the said court. It reads as follows:-

“Ref. MI/CF11.Vol.III

**18th October, 2010
Resident Magistrate
Municipal Court
MOMBASA**

CRIMINAL CASE NO. M./4669/10

**MUNICIPAL COUNCIL OF MOMBASA –V-
MOHAMED IBRAHIM ABDI OF TRADE PLUS INTERNATIONAL LTD
COMPLIANCE**

We hereby write to confirm to the Honourable Court that the structures were demolished to the ground level as per the Building Notice on Plot No. 232/2/II/MN Mishomoroni area, Mombasa within the Municipality which were developed without development authority from Municipal Council to the Council’s satisfaction on 18th October 2010.

**TUBMAN-OTIENO
TOWN CLERK “**

From the foregoing Court order issued on 12th October 2010 and the letter dated 18th October, 2010, I do find that through an order by a court of law the Municipal Council of Mombasa in compliance of the court order and in discharge of its functions under the local Government Act, demolished all the structures on the suit property, plot No. 232/2/II/M.N., to the ground level on 18th October 2010.

This material was not led before the court by the plaintiffs. They cannot be blamed for this as they may not have had possession of a copy of the said court order and copy of the letter as it appears to have been obtained and enforced without their involvement and prior knowledge.

What is certain is that when the plaintiff’s came to court on 22nd October 2010 they did not fully disclose the extent of the demolition. At the ex parte stage, Counsel told the court that the demolitions were ongoing and not completed. The court at the ex parte stage many a times does not scrutinize all the documents in depth and tend to rely on the Counsel for the ex parte Applicant. The court at the ex parte stage proceeds on the good faith of the Applicant.

While the plaintiffs did not mislead the court as they disclosed that their structures had been demolished and they were sleeping in the cold, however they did not tell the court the extent of the demolition i.e. that they had all been brought down to ground level and that they had no shelter on the premises whatsoever as a result.

During the oral submissions, when the court made inquiries about the position on the ground, counsel for the plaintiffs submitted there was partial demolition and not eviction. That they have not been

fully evicted.

In view of the foregoing, how should the court decide on the question of possession and occupation? I do find that there was valid order of a court of law which was issued for the demolitions of the structures on the suit property. I do find that the court order was issued on 12.10.2010 well before the 22.10.2010 when the application for injunction was filed in this court by the plaintiffs. It was subsequently complied with and enforced by the Municipal Council. I do find that on the basis of the letter of the Town Clerk on 18.10.2010, the court order was fully enforced and complied with. All the structures were brought down and demolished to the ground level. This in effect means that the plaintiffs by 18.10.2010 did not have any structures on the suit property which were of any use for dwelling or other use.

The issue of whether evictions took place becomes contentious as it would depend on who is interpreting or answering the questions. It is this court's finding that it is not clear to what extent any eviction took place as a result of the demolition and whether the plaintiffs can in law continue to be on the suit premises without any structures and shelter.

I must set the record straight here that the validity and legality of the court order by the Municipal Council is not before this court. The plaintiffs in their submissions have attacked the validity/legality of the court order and the Notice issued by the Council for demolishing of their structures as the plaintiffs were not made parties and were not served with any summons or Notices. The plaintiffs allege some conspiracy between the defendant and the Municipal Council of Mombasa.

This court has no jurisdiction to set aside or quash the said court order. In any case, it has been embraced with serious and substantial consequences on the occupation of the suit premises by the plaintiffs and the de facto position on the ground.

Despite the clear adverse effect and suffering by the Plaintiffs, there is no appeal or application before this court to set aside the aforesaid court orders. In this suit for a claim of Adverse Possession, the suit in which the court order was obtained is not a subject matter. I have no legal basis or jurisdiction to interfere with the court order which in any case has been enforced. It was the duty of the plaintiffs to move with speed as they did in this case to obtain stay orders and to attempt to reverse the said court orders. As a result, this court unfortunately cannot be of any assistance to the plaintiffs. I would be assuming a jurisdiction that I do not have.

In the temporary injunction application the plaintiffs sought inter alia orders, to restrain the Defendants from evicting them or further demolishing their structures. By the time the plaintiffs came to this court, the demolition had fully been carried out on the basis that the structures were illegal structures put up in violation of the Physical Planning Act and without necessary authority of the Council. These are findings and orders of a court of law with competent jurisdiction. My concern is that if for any reason, this court were to grant temporary injunction against the demolition, it would be an act in vain and really an absurdity in law. Firstly, the demolition has been carried out fully by orders of a court of law. Secondly, to grant the orders, the plaintiffs would be tempted to put up new structures using this court's orders. This would create total confusion and disorder as this court has no power to allow the structures to be erected again and new structures to be erected as the court is not the licensing authority for developments and buildings in Mombasa Municipality or anywhere else.

The plaintiffs can only put up new structures with the approval of the Municipal Council of Mombasa. The existing structures have been all demolished, any order that purports to stop it from completing demolition would appear to "licence" or authorize the erection of new structures So that the plaintiffs can meaningfully remain on the suit premises. Since this danger is there, a fact that the defendant has complained about during the pendency of the applications, this court is not inclined to order any temporary injunctions to stop demolitions.

In any case, most significant, it is too late to grant any temporary injunction to stop demolition as the demolition was carried out well before 22.10.2010. There is nothing to stop.

With regard to evictions I am of the view that on a balance of probabilities, the demolitions of the structures in effect must have led to substantial eviction of many of the plaintiffs. The Plaintiffs Counsel did not tell the court how many persons still remained on the premises by 22.10.2010. It was the plaintiff's duty to file a further affidavit identifying specifically the particular plaintiff's by naming them

and each swearing an affidavit to confirm that he/she was still on the land. To be in occupation in the suit premises one as a matter of necessity, needs some shelter/accommodation. No one has told the court and claimed that the land is agricultural land in which a person does not have to be physically on throughout. The disputed suit here, according to the material placed before the court is far mainly dwelling houses, homes of the applicants who are mainly fishermen.

On a balance of probabilities, this court cannot establish and determine at this stage how many of the 209 plaintiffs are still on the premises as there are no structures and houses on the land after the demolition. The plaintiffs could have assisted the court in this regard. If the court grants a blanket injunction order, it will be certainly used improperly by any plaintiff who is still in “occupation” which is doubtful in the circumstances. For one to have a lawful home and dwelling structure it would require the approval of the Municipal Council of Mombasa. As the Court’s Orders cannot confer such approval as permissions, it is reasonable to find which I hereby do that the demolition carried out on 18.10.2010 in effect led to the eviction of the plaintiffs from the suit premises. This court does not see how an occupation of property for dwelling or business purposes can lawfully exist without legal developments, buildings, and structures. In circumstances of this case, the Municipal council have demolished and leveled all illegal structures.

The Plaintiffs through their counsel submitted that some of them are still living in makeshift structures in the property. If this is true, then the said makeshift structures must have been erected after 18th October 2010 which is in defiance of the court order issued by the Municipal Court issued on 12th October 2010 and enforced on 18.10.2010. Any orders in their favour at this stage will tend to legitimize the fresh erections and/or re-entry of the plaintiffs into the property. As stated above, it would be irregular and without jurisdiction for this court to give orders which in effect reverse the valid orders of another court with competent jurisdiction. However, painful and even irregular the said court’s orders be, they must be challenged in accordance with due process and proper procedure.

The plaintiffs submitted that the orders of the Municipal court did not mention the defendant in any place and did not authorize the eviction of the plaintiffs but only demolition. That is true, however there is no dispute that the structures that were demolished were those on the suit premises and they belonged to the plaintiffs. I had found that no eviction was ordered but the demolition of all the structures to the ground level were such that there are no legal structures on the land and the effect was to render the plaintiffs without any houses or structures. This in effect has led to eviction as they cannot remain on the land without new structure approved by the Council and the property is registered in the name of the defendant.

The authorities relied upon by the plaintiffs:-g. **KENYA BUS SERVICES, MOMBASA LTD –V- CMC MOTORS GROUP – HCCC NO. 547 OF 1999, MOMBASA** is not applicable here as the acts of demolition herein were not strictly the acts of the defendant but of a third party, the Municipal council and had the legal backing of a court order. They were not unlawful unless set aside and so declared by the High Court.

When considering an application for temporary injunction pending the hearing of a suit, this court must be guided by the principles set out in “causa célèbre” – **GIELLA –V- CASSMAN BROWN - & CO. LTD, (1973) EA 358** which are:-

- “ (i) The Applicant must show a prima facie case with probability of success.**
- (ii) The applicant will suffer irreparable damage that cannot be compensated by way of damages.**
- (iii) when the court is in doubt, it will decide the application on a balance of convenience.**

A person claiming to be entitled to land/property by adverse possession must at the time the suit is heard or when an application for temporary injunction pending the hearing of the suit, must prove that he is in occupation and possession of the suit property. In this case with its special circumstances and on a balance of probabilities the plaintiffs have not shown that they are in exclusive occupation of the suit

property. Any effective occupation was destroyed and/or removed by the enforcement of the court order of the Municipal Court on 18.10.2010. There is nothing to show for the continued occupation of the suit property. As was held in **FARAJ MAHARAJ –V- J.B. MARTIN GLASS INDUSTRIES (2005)** e KLR, at p. 7,

“As the basic fabric of the Appellant’s suit had been torn apart, there was no chance of it succeeding as there was no longer any legal foundation for it. It was plain and obvious that the suit was frivolous. As it lacked foundation sustaining a hearing it would have amounted to wasting court’s time...”

In this case, the legal foundation for the claim of Adverse possession was occupation which now in law and fact, is doubtful, if not unproven in the circumstances. The plaintiffs’ previous occupation if any was removed by total demolition of their structures. Any occupation they may have on the ground today is not the kind of exclusive occupation envisaged in a proper course of action founded on adverse possession.

When submitting on the first criterion to establish for the grant of temporary injunctive order, (I.e. prima facie case with a probability of success), the Defendant referred to the provisions of Section 41, of the Limitation of Actions Act, Cap 22, Laws of Kenya which provides that:-

“This Act does not

(a) Enable a person to acquire any title to or any easement over

(i) Government land or any land otherwise enjoyed by the Government”

Section 2 of this said Act defines “Government” to include government corporations. The Act defines Corporation’s to mean – Kenya Railways Corporation, the Kenya Ports Authority and the Kenya Posts and Telecommunications Corporation. The Defendant submitted that the record shows that the suit property belonged to Kenya Ports Authority since 1987 when it acquired it from Bunty Estates Limited which was the registered owner of the suit property before. The counsel for the Defendant added that no period of limitation was running until this land was transferred to the Defendant.

I have carefully perused the Title to the suit premises. The root title shows that the property was acquired by the Kenya Ports Authority on 20.01.2002. The Kenya Ports Authority transferred the property to the Kenya Ports Authority Pension Scheme which transferred the property to the Defendant which was registered as owner on 15th March 2010.

I do find as a fact that the plaintiffs did not set up a claim for adverse possession and had not filed any suit against the Kenya Ports Authority before it divested ownership on 30.01.2002. As a result the period for limitation on this title could not run in favour of the plaintiffs before 30.01.2002. The earliest time could run was from 17.06.2008 when the K.P.A. scheme became the registered owner . It follows that the prescribed period of 12 years had not been attained by the plaintiffs when they filed their case against the Defendant on 14th June 2010.

On the said ground and for the said reason, I do find that the plaintiffs’ claim does not have any probability of success. The plaintiff claim is that they had acquired the land by adverse possession by the time the defendant was registered and rights had been extinguished. With respect, this cannot be the law, if the plaintiffs could not set up the claim against Kenya Ports Authority before 17.06.2008 as time could not run, then they could not be said to have acquired such title.

I do hold that on this ground too, the plaintiff’s claim is unlikely to see the light of day.

The result is that the plaintiff has not shown that it has a prima facie case with probability of success. The application must therefore fail. I do hereby dismiss the plaintiff’s application dated 22nd

October 2010 with costs to the Defendant. The Interim orders granted herein on 22nd October 2010 and what remained of it after the orders of 25th October 2010 are hereby discharged.

Dated and delivered at Mombasa this 6th day of December 2010.

M. K. IBRAHIM
J U D G E

Coram:

Ibrahim J

Court clerk – Kazungu

Mr. Jumbale for the Applicant

Mr. Garama for the Respondent

Ruling delivered in the presence.

Ibrahim, J