



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Civil Case 61 of 2006**

**SUSAN GATHERI RIMBERIA**

**(Suing thro' SAMUEL MWENDA) .....PLAINTIFF**

**VERSUS**

**AMINA BASHANI & 19 OTHERS .....DEFENDANTS**

**R U L I N G**

**Susan Gatheri** Rimberia through her Attorney Samuel Mwenda filed a plaint dated 30<sup>th</sup> March 2006 in which she prayed for judgment as follows against Amina Bashan & 19 others:

- (i) *A declaration that the defendants or any other person claiming possession under them are not entitled to enter L.R. No. Mombasa Ms. Block/237 and that their occupation thereof is wrongful and or unlawful.*
- (ii) *A mandatory injunction compelling the defendants, their servants and or agents or any other person claiming title or possession under them forthwith deliver L.R. No. Mombasa MS Block.237 to the plaintiff.*
- (iii) *Costs of the suit.*

When served with the plaint the defendants filed a joint defence denying the plaintiff's claim. They claimed that the plaintiff's suit was time barred in that they, have been in occupation of the aforesaid land for a period of over 13 years. The defendants further claimed that they have acquired the parcel of land by adverse possession.

Pending the hearing and determination of this suit, the plaintiff has sought for an order of Mandatory injunction against the defendants with a view of compelling them to deliver up to the plaintiff vacant possession of the suit land. The application is expressed in a summons dated 30.3.06 filed pursuant to Order XXXIX rules 1,2,3 and 9 of the Civil Procedure Rules. The summons is supported by the affidavit of Samuel Mwenda sworn on the same date. It is also buttressed by a supplementary affidavit of the same deponent sworn on 19<sup>th</sup> May 2006.

The defendants filed a notice of preliminary objection to oppose the summons on the basis that the application is incompetent and bad in law. Mr. Ng'ang'a advocate for the applicant submitted before this court to the effect that the summons should be allowed in that the applicant has shown that she has a prima facie case by virtue of the fact that title to the suit property is in her name. The applicant claimed

that the defence of adverse possession cannot be sustained.

On his part, Mr. Okanga advocate for the defendants, was of the view that the summons should be rejected because the plaintiff's suit is statute barred. The learned advocate was also of the view that applications for mandatory injunctions cannot be agitated under Order XXXIX of the Civil Procedure Rules.

It is clear from the onset that it is not disputed that the plaintiff is the registered proprietor of L.R.NO.Mombasa MS/Block.237. The issue is whether or not the title has been extinguished by adverse possession. The defence is of the view that the suit is time-barred in that they have been in an uninterrupted occupation for a period of over 13 years. The plaintiff is of the opinion that this submission should not stand because the defendants came into occupation of the suit property in the year 2000 and not 1993 as alluded. The issue touching on the occupation of the suit land can only be determined as a fact by factual evidence through a substantive hearing. Before granting an order of mandatory injunction at an interlocutory stage there are certain principles which must be met. It suffices to restate the principles set in the English case of **Locabail International Finance Ltd. =vs= Agro export and other [1986] 1. ALL E.R. 901** as follows:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. More over, before granting a mandatory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

In applying these principles to this matter, I am convinced that this is not one of those cases which a mandatory injunction should be given at an interlocutory stage. The defence raised is a serious one which can upstage the entire suit if proved at the end of the trial. Further more if the defendants are alleged to have trespassed into the suit land in the year 2000 then why didn't the plaintiff take action immediately. There is nothing which prevented the plaintiff from seeking for limited letters of administration *ad litem* to enable her file this suit in the earliest opportunity. I do not see the urgency in granting a mandatory injunction at this stage. It has not been said that the defendants are busy committing wanton destruction of the suit premises. The best way this matter can be handled is to have the suit substantively heard on priority basis.

On the issue as to whether order XXXIX of the Civil Procedure rules is applicable or not to Mandatory injunctions, a critical perusal of order XXXIX reveals that the order applies to both prohibitory and mandatory injunctions. That being my appreciation of the law, the objection must fail.

In the end the summons dated 30.3.2006 is ordered dismissed with costs to the defendants.

Dated and delivered at Mombasa this 9th Day of February 2007.

J.K. SERGON

J U D G E