



Nyamai & 291 others v South Eastern University College (Environment & Land Case E001 of 2021) [2022] KEELC 15290 (KLR) (6 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15290 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE E001 OF 2021
LG KIMANI, J
DECEMBER 6, 2022**

BETWEEN

WILLIAM NYAMAI & 291 OTHERS PLAINTIFF

AND

SOUTH EASTERN UNIVERSITY COLLEGE RESPONDENT

RULING

1. This ruling is in respect of the Amended Notice of Motion dated 19th October 2021 and amended on 27th June 2022. The application seeks the following orders;
 - a. Spent
 - b. Spent
 - c. That a temporary injunction be issued restraining the Respondents herein either by themselves, agents, employees, proxies and/or servants from entering, evicting, subdividing, obtaining consent for transfer, selling, transferring, disposing, wasting, alienating and/or dealing with land parcel LR No. 13529 situated Kwa Vonza Location in Kitui County pending hearing and determination of this suit.
 - d. That costs of this application be provided for.
2. The application is supported by the affidavit of William Nyamai the 1st Applicant on behalf of the other applicants sworn on 22nd June 2022 and a supplementary affidavit sworn on 6th October 2022
3. The grounds in support of the application are that the Applicants claims to have been in occupation, possession, use and enjoyment of the suit parcel of land in excess of 25 years and have thus acquired ownership by way of adverse possession and their rights should be protected in the interim. They claim that the Respondents will not suffer any prejudice if the orders sought are granted.



4. The applicants claim that they have in the course of the years been in occupation of the suit land exercised ownership rights by constructing both permanent and semi permanent houses, building schools and churches, constructing roads, rearing livestock, burying their deceased family members and that the Respondents have without notice initiated mechanisms or removing them from the suit land in order to defeat their claim of ownership.
5. The Respondent filed a replying affidavit sworn by Prof. Geoffrey M. Muluvi on 28th October 2021 and stated that the Respondent is a stranger to the contents of both the application herein and the amended originating summons.
6. The Respondent claims that it is the successor of what was previously known as South Eastern University College (SEUCO) that succeeded Ukamba Agricultural Institute (UKAI) an institute established in 1976 as a center to promote education and research in dry land farming. That by virtue of legal notice No. 102 of 2008 dated 18th July 2008 SEUCO was established to succeed UKAI as a result of which all the property, rights and liabilities held by UKAI were vested to SEUCO
7. In the year 2013 and through a University Charter dated 1st March 2013 the South Eastern Kenya University (SEKU) was established as a fully chartered Public University to succeed SEUCO. As a result all the property, assets, rights and liabilities held by SEUCO were vested to the SEKU.
8. That among the assets inherited as a result of the legal instruments was the property situated within Kwa Vonza area within Kitui County Government LR No. 13529 donated to the University for educational purposes through a lease granted for a term of 99 years from 1st October 1976. The Respondent has exhibited the said lease document.

The Applicant's Submissions

9. The Applicants filed written submissions and highlighted that the title deed that the Respondent produced as evidence bears the name of Ukamba Agricultural Institute Limited and not Ukamba Agricultural Institute; their predecessor and that an application dated 21/09/2022 to enjoin Ukamba Agricultural Institute is still pending determination.
10. With regard to the application at hand, the Applicants relied on the case of *Mtana Lewa v Kabindi Ngala Mwanagandi*(2005)eKLR that sets out the ingredients of adverse possession as well as the case of *Jandu vs Kirplal & Another* (1975) EA 225 where the Court held that adverse possession must be adverse to the owner , actual, visible, exclusive, open and notorious.
11. The Applicants submitted that they have been in occupation of the said suit property for a period of close to 25 years now evidenced by permanent and semi-permanent houses, schools and churches, constructed roads, rearing of livestock and the burial of their deceased family members on the suit property. They therefore submit that they have demonstrated a prima facie case with a high chance of success as set out in the precedent-setting case of *Giella vs Casmman Brown* (1973).
12. Relying on the holding in the case of *Githu v Ndete* (1984) KLR 776, they submitted that the Respondent has asserted its rights by making an effective entry into the suit land, as it has never tried to forcibly enter the suit land or evict the applicants. That they stand to suffer irreparable harm that cannot be compensated by damages since if their homes and buildings are demolished, they will be rendered homeless and they and their children will lack food, shelter and school.



The Respondents Submissions

13. Counsel for the Respondent filed written submissions and stated that as per Section 41(a) of the Limitation of Action Act CAP 22, public land is excluded from being acquired through adverse possession. The Respondent being a State Corporation as a public university, its land falls under the ambit of public land as described by Article 62 of the Constitution of Kenya. Counsel stated that the Respondent is the successor of what was previously known as South Eastern University College (SEUCO) that succeeded Ukamba Agricultural Institute (UKAI) by virtue of Legal Notice No.102 of 20008 dated 18th July 2008 and as a result, all the property, rights and liabilities held by UKAI were vested in South Eastern University College (SEUCO) which later became South Eastern Kenya University (SEKU), pointing to Clause No.3 (4) of the said Legal Notice.
14. The Respondent submitted that since the Lease for the suit property LR No.13529 runs for a period of 99 years as from 1st October 1976, it has been in possession, occupancy and utilization of the suit property for over 46 years, where the government has funded the infrastructure thereon. They relied on the case of Masek Ole Tinkoi & 3 others v Kenya Grain Growers Limited & 2 others (2018) eKLR that also took the position that public land is excluded from claims of adverse possession.
15. According to the 1st Respondent, the Applicants have not established a prima facie case against the 1st Respondent or proven their legal right and claim over the suit property for the orders sought. They relied on Section 107(1) and (2) of the Evidence Act on burden of proof. It is the 1st Respondent's submission that the Application lacks merit and should be dismissed with costs.
16. The Respondent also stated that it is a public institution that is spending a lot of money on development of its main campus and if this amendment was to be allowed, it would cause serious injustice on the Respondent which cannot be cured by way of compensation and therefore prays for the Notice of Motion Application dated 3rd December to be dismissed with costs.

Analysis and Determination

17. I have considered the Notice of Motion application Amended dated 19th October 2021 and amended on 27th June 2022, and find the following issues arise for determination:
 - a. Whether the Plaintiff/Applicant's Application has met the threshold established for grant of orders of injunction as prayed
 - b. What orders should the court make?
 - c. Who shall bear the cost of the Application?

a. Whether the Plaintiff/Applicant's Application has met the threshold established for grant of orders of injunction as prayed

18. The application herein is brought under Order 40 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. Section 63 (c) of the Civil Procedure Act provides for the courts power to grant temporary injunctions and states that;

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold



19. Order 40 Rule 1 of the [Civil Procedure Rules](#) provides for cases in which temporary injunctions may be granted and states as follows;

“Where in any suit it is proved by affidavit or otherwise—

- a. that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

Rule 2 provides

“In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.”

20. Further, the conditions set for consideration in granting an injunction are now well settled in the case of *Giella vs Cassman Brown & Company Limited*(1973) EA 358, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction:-

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

21. Have the Applicants established a prima facie case with a probability of success? [Black’s Law Dictionary](#) 11th Edition defines a prima facie case as “the establishment of a legally required rebuttable presumption. A parties production of enough evidence to allow the fact – trier to infer the fact at issue and rule in the party’s favour”

22. A prima facie case was explained as follows in the case of [Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others](#) [2015] eKLR, the Court of Appeal detailed what probability of success means when it stated that:

“In *Habib Bank Ag Zurich V. Eugene Marion Yakub*, CA No. 43 OF 1982 this Court considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus:

“Probability of success means the court is only to gauge the strength of the Plaintiff’s case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.”



The court further stated

“A prima facie case with a probability of success does not, in my view, mean a case, which must eventually succeed.”

Yet again in *Agip (K) Ltd v. Vora* [2000] 2 EA 285, at page 291, while reversing a grant of an order of injunction by the High Court, this Court stated:

23. At this stage of the suit, all the court is required to decide is whether there is a prima facie case with a probability of success and it cannot delve into substantive issues and make final conclusions on the dispute or condemn one of the parties before hearing oral evidence that party being condemned had in opposition to the claims in the suit.
24. It is important at this stage to have an overview of the nature of the proceedings before the court. The plaintiffs claim that they have become entitled to the suit property by adverse possession. The [Limitation of Actions Act](#) provides for adverse possession at Section 7 as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.
25. Further, Section 13 of the [Act](#) provides:
 - (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
 - (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
 - (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12 (3), the land in reversion is taken to be adverse possession of the land.
26. Section 38 (1) of the [Act](#) enables a person who claims to have become entitled to land by adverse possession to apply to court to be registered as the proprietor. It provides:
 - (1) 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.”



27. Asike – Makhandia JA summed up adverse possession as follows in *Mtana Lewa v Kabindi Nala Mwagandi* [2015] eKLR:

...Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

28. Section 41 (a) (i) on the other hand excludes public land from being acquired through adverse possession. It provides:

41. This Act does not -
- (a) enable a person to acquire any title to, or any easement over-
- (i) Government land or land otherwise enjoyed by the Government;

29. In the present case, the Applicants claim that they have been in occupation, possession and have developed the suit land for over 25 years and the Respondent have not interfered with that occupation. The Applicants have annexed copies of photographs. The Respondent denies the contention that the Applicants have ever settled on the suit land and claim that the only structures on the suit land are infrastructure and facilities constructed by the National Government.

30. Considering that the Applicants claim is for adverse possession, it is important that they show a prima facie case by establishing by way of evidence a legally rebuttable presumption that what they claim is true to enable the court to rule in their favour. The photographs exhibited as proof of possession and occupation are photocopies that are unclear. It is difficult to confirm the location of the buildings or crops that are on the said photographs. The authenticity of the photographs will need to be proved at the trial. As stated above this is especially important considering the Respondents claim that the Applicants have never settled on the suit land.

31. Further, I have considered the claim by the Respondents that the Applicants cannot lay a claim for adverse possession on the suit premises since the same is Public land. They seek refuge under the Provisions of Section 41 of the *Litmitations of Actions Act* which is quoted extensively previously. I have further considered the uncontroverted claim by the Respondent that it is a State Corporation fully funded by public funds. I have looked at the Respondent's Charter dated 1st March, 2013 which shows that the Respondent is established under Section 12 of the *Universities Act* No. 12/2012 as a public university.

32. A Public and Private University are defined and differentiated by the Provisions of Section 2 of the *Act* which provide as follows:

“private university” means a university which is not established or maintained out of public funds;

“public university” means a university established and maintained out of public funds

Section 44 Provides for the funding of Public Universities and states as follows:



- (1) A public university shall prepare and submit its annual estimates of revenue and expenditure to the Cabinet Secretary for approval in such form and at such times as the Cabinet Secretary shall from time to time prescribe
- 2) A Public University may incur expenditure for purposes of the institution in accordance with estimates approved by the Cabinet Secretary, and any approved expenditure under any head of the estimates may not be exceeded without the prior approval of the Council.
3. A Public University may, subject to any other written law, regulations and guidelines, appeal to the general public for subscriptions, donations or bequests for the benefit of the university.”

33. Section 45 (2) provides for the annual estimates for Public Universities and states as follows:

“(2) There shall be made to the Public University, out of monies provided by Parliament for that purpose, grants towards the expenditure incurred in the exercise of its powers or in performance of its functions under this Act.”

34. From the foregoing provision it is quite clear that the Respondent is a Public Institution funded by Public funds. I am also satisfied from the documents that have been provided that all rights liabilities and assets held by or on behalf of UKAI automatically and fully transferred to SEUCO through Legal Notice No. 102 of 2008, the South Eastern University Order 2008. One of the assets inherited by SEUCO was the suit land LR. No. 13529. The said grant is a leasehold from the County Council of Kitui for a term of 99 years from 1st October 1976. Further by virtue of the charter the Respondents properties were acquired by South Eastern Kenya University (SEKU) one of the properties acquired is the suit land .

35. The *Constitution* of Kenya 2010 defines public land under Article 62(1) as follows:

Public land

(1) Public land is—

- (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;
- (b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;
- (c) land transferred to the State by way of sale, reversion or surrender;
- (d) land in respect of which no individual or community ownership can be established by any legal process;
- (e) land in respect of which no heir can be identified by any legal process; (Emphasis added)

36. The court declared land lawfully used by Kenya Revenue Authority which is a state organ, as security for tax owed to the government public land in the case of *Masek Ole Tinkoi & 3 others v Kenya Grain Growers Limited & 2 others* [2018] eKLR and stated as follows;

“The upshot of these provisions is that the suit property is currently used or enjoyed by the government of the Republic of Kenya as security for tax liabilities owing from the 1st defendant. This brings the land under the category of “land otherwise enjoyed by the



Government” under Section 41 (a) (i) of *Limitation of Actions Act* as well as under the category of public land which is defined at Article 62(1)...”

37. On the face of the documents supplied by all the parties the Respondent has shown that the suit land is likely public land under Article 162 (1) (b) of the *Constitution* of Kenya 2010 for the reason that the Respondent is a public body or authority utilizing the suit land for a public purpose. I also find that on the face of it the land is subject to the provisions of section 42 of the *Limitation of Actions Act*. I therefore find that the Applicants have not established a prima facie case with a probability of success.
38. Further, the Applicants have not shown the actions taken by the Respondent that would amount threats of eviction or what the Applicants claim to be initiation of mechanisms of removing them from the suit land. It has not been shown who issued the said threats and in what form the threats were made. I therefore find that there is no proof of any threats of eviction of the Applicants that would warrant the issuance of the orders sought. I find that the Applicants have not also shown that they might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.

What Orders should the Court make?

39. For the foregoing reasons I do find that the Amended Notice of Motion dated 19th October 2021 and amended on 27th June 2022 lacks merit and the same is hereby dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT KITUI THIS 6TH DAY OF DECEMBER, 2022.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE KITUI

Ruling read virtually and in open court in the presence of-

Musyoki C/A

Kalwa Advocate for the Plaintiff/Applicant

M/S Wambui Advocate for the Respondent

