



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. E002 OF 2020

NYALI BEACH CYCADS LIMITED.....PLAINTIFF

VERSUS

FRANCIS KAMAU GUCHU.....1ST DEFENDANT

MWAURA KINYANJUI.....2ND DEFENDANT

KAMAU WAWERU.....3RD DEFENDANT

LUKAS MUTUA.....4TH DEFENDANT

RULING

1. In the Application dated 16th September, 2020, the Plaintiff has sought for the following orders:

a) That pending the hearing and determination of this suit an order do issue compelling the Defendants, their servants, agents and/or whomsoever to remove all illegal structures erected on L.R. No. 3565 and all those parties claiming title under them do vacate the property on the basis of the survey report dated 18th April, 2011.

b) That the Honourable Court be pleased to order the Officer Commanding Kikomba Police Post to enforce the Court orders issued herein.

c) That in the alternative to prayers (a) and (b) above, the court be pleased to order the Machakos County Land Surveyor to re-survey the boundaries of L.R. No. 3565 situated in Kikomba area within Machakos County and establish and mark the portion occupied by the Defendants and on which property and prepare a report to be filed in court within 30 days.

d) That pursuant to the said survey report, this court does order that the Defendants, their servants, agents and/or any person whomsoever be forthwith evicted from L.R. No. 3565.

e) That the cost of this Application and preparation of survey report if need be, be borne by the Defendants.

2. The Application is supported by the Affidavit of the Plaintiff's Director who has deponed that the Plaintiff is the absolute registered owner of all that piece of land known as L.R. No. 3565 situated in Kikomba area within Machakos County (*the suit property*) and that the Plaintiff bought the suit property from Magutu Company Limited sometimes in the year 2009 free from any encumbrance and/or adverse claim from third parties and a transfer was registered in the Plaintiff's favour.

3. The Plaintiff's Director deponed that sometimes between August, 2009 to December, 2009, the 1st, 3rd and 4th Defendants, together with one Kinyanjui Gakubu, the deceased father of the 2nd Defendant, trespassed, entered and occupied the Plaintiff's property, where they started cultivating and harvesting crops and that the Plaintiff filed suit No. 1102 of 2009 at the Thika Chief Magistrate's Court against the 1st, 3rd and 4th Defendants and one Kinyanjui Gakubu (*deceased*).

4. It was deposition of the Plaintiff's Director that in their Defence to that suit, the Defendants pleaded that they were neighbours to the suit property and that the parcel of land they were occupying is known as Kaseku Farm to which no Title Deed has been issued and that his advocate (*the Plaintiff's*) did a letter dated 7th April, 2010 in which he proposed an out of court settlement on the basis of a survey report to be prepared by the District Land Surveyor which would be binding on all parties.

5. The Plaintiff's case is that Thika CMCC No. 1102 of 2019 was not determined on its merits and was withdrawn for want of territorial

jurisdiction; that the Plaintiff thereafter filed SRMCC No. 1 of 2011 at Yatta Law Courts seeking eviction orders against the 1st, 3rd & 4th Defendants and one Kinyanjui Gakubu (*deceased*) and that in their Defence to that suit, the Defendants pleaded that they were squatters occupying trust/government land to which no Title Deed had been issued.

6. It was the deposition of the Plaintiff's Director that the Defendants denied trespassing and/or living on the Plaintiff's land and countered that it was the Plaintiff who intended to annex their parcels of land; that the Defendants then consented to a court order that the District Land Surveyor in conjunction with the Survey of Kenya do demarcate the boundaries between the Plaintiff's land and the area they occupied and that in the event it is determined that they had encroached on the Plaintiff's property, they would forthwith vacate the property.

7. It was deponed that pursuant to the consent order, the survey was done on 15th April, 2011 and the boundaries of the suit property were determined; that the surveyor's report was clear and revealed that all the Defendants occupy and cultivate a portion of the Plaintiff's property and that the survey report was never challenged by the Defendants.

8. According to the Plaintiff's Director, not being the rightful owners of the suit property, the Defendants were evicted pursuant to the consent order of the court, which eviction was supervised by police from Kithimani Police Station; that subsequently, the Defendants illegally returned to the suit property and filed a Judicial Review Application at the High Court in Machakos, HC Misc. No 155 of 2011 challenging the pecuniary jurisdiction of the court in Yatta and that sometimes in the year 2011, Kinyanjui Gakubu, the father of the 2nd Defendant herein died and was unlawfully buried on the suit land at night.

9. It was deponed that the 2nd Defendant trespassed and occupied the suit property after his father died; that he has constructed some structures on the land and purports to lease part of it to unsuspecting third parties; that the Defendants have no equitable or legal rights on the property and are mere trespassers and that unless the orders prayed for are granted, the Plaintiff shall continue to suffer irreparable damage and loss as its constitutional right to quiet and peaceful use and occupation of the suit property continue to be violated by the Defendants.

10. The Plaintiff's Director finally deponed that the trespass on the suit property by the Defendants is unlawful and illegal; that the 2nd Defendant is especially very violent and thus the need to have the Officer Commanding Kikomba Police Post to enforce the court orders issued herein and that unless the Defendants herein are restrained by an express order of this Court from interfering with the Plaintiff's property, they shall continue to illegally occupy part of the suit property.

11. In his Further Affidavit, the Plaintiff's Director deponed that Kaseku Farm, the property the 1st and 3rd Defendants allege they reside on, is adjacent to the Plaintiff's property L.R. No. 3565, that is to say, the two properties border each other and that sometimes between August, 2009 to December, 2009, without authority, permission, license or right, the 1st, 3rd and 4th Defendants together with the deceased father of the 2nd Defendant entered and occupied a portion of the property and begun cultivating thereon.

12. It was deponed that the 2nd Defendant's father, Kinyanjui Gakubu, also constructed a semi-permanent thatched house on the Plaintiff's property near the boundary of the Plaintiff's property and Kaseku farm and that consequently, the Plaintiff instituted SRMCC No. 1 of 2011 at Yatta Law Courts seeking eviction orders against the four trespassers in which they pleaded in their Defence that they were squatters who occupied trust land called Kaseku Farm and not the suit property.

13. It is the Plaintiff's case that the 1st Defendant herein and Kinyanjui Gakubu (*deceased*) entered into a consent order that the District Land Surveyor in conjunction with the Survey of Kenya do demarcate the boundaries between the suit property and the land that the Defendants were occupying; that the survey was done sometimes in April, 2011 and that the report determined that the 1st, 2nd and 4th Defendants herein and Kinyanjui Gakubu (*deceased*) were in occupation and cultivated L.R. No. 3565.

14. It was deponed by the Plaintiff's Director that it is misleading for the 1st and 3rd Defendants to claim that there has never been an issue of encroachment in respect of the suit property yet there have been several cases over the same land; that an eviction order was issued by the court and that the Defendants herein are squatters in occupation of 30 acres of the suit property.

15. It was deponed that the Plaintiff is not interested in any way whatsoever with the property known as Kaseku Farm; that all it wishes for is for the protection of its guaranteed constitutional rights to quiet and peaceful enjoyment of its property by eviction of the Defendants who continue to illegally occupy and cultivate the suit property and that unless the orders sought are granted and the Defendants restrained by an express order of the court, the Plaintiff shall continue to suffer irreparable damage and loss as its rights continue to be violated by the Defendants who still occupy and cultivate the suit land.

The 1st and 3rd Defendants' Response

16. The 1st Defendant swore an Affidavit on his behalf and on behalf of the 3rd Defendant. The 1st Defendant deponed that his family and the family of the 3rd Defendant occupy Kaseku Farm and not on L.R. No. 3565; that at the time the Plaintiff purchased L.R. No. 3565, they were still residing on Kaseku Farm and that the Plaintiff is hell bent on taking their land in the pretext that the area they occupy is part of L.R. No. 3565.

17. The 1st Defendant deponed that their fathers and grandparents are on Kaseku Farm and not on L.R. No. 3565; that the Plaintiff is not entitled to the orders that it has sought because they (*the 1st and 3rd Defendants*) reside on Kaseku Farm and not on the suit property.

The 2nd Defendant's Response

18. The 2nd Defendant filed an Application dated 29th September, 2020 in which he prayed for an order that the Plaintiff's Application

should be struck out for want of material disclosure, being mischievous and abuse of the court process. In his Supporting Affidavit, which may as well be his Affidavit in reply to the Plaintiff's Application, the 2nd Defendant deponed that the ex-parte orders of 17th September, 2020 requires him to be evicted from the suit property; that in 1936, his father Kinyanjui Gakubu settled and occupied all that land known as plot number 3565 in Ithanga measuring approximately 511 acres and that there was another land neighbouring plot number 3565 being plot number 3566 having the same measurement and belonging to Magutu Company.

19. According to the 2nd Defendant, sometimes in the year 2011, the Plaintiff hatched a plan to have plots 3565 and 3566 consolidated; that the Plaintiff sued his father in Yatta SRMCC No. 1 of 2011 and that the lower court did not have the pecuniary jurisdiction to handle the dispute.

20. The 2nd Defendant deponed that it is curious how the title in respect to the suit property was acquired since a scrutiny of the same alongside the title for plot number 3566 discloses similarity in all the entries; that his father was always in occupation of the suit land; that they were raised on the suit property and that their occupation of the suit property has been actual, visible, exclusive, open and notorious.

21. It was deponed that the 2nd Defendant's family is in this court in respect to the suit property in Machakos ELC No. 202 of 2017; that the Plaintiff's property rights to the suit property have already been extinguished by the actual, open, notorious and exclusive occupation of the suit land and that its unjust for this court to have issued the orders whose effect is to have them evicted from the suit property.

22. The 2nd Defendant also filed an Affidavit in response to the Plaintiff's Application. According to the 2nd Defendant, by the time the Plaintiff was purporting to purchase the suit property in the year 2009, his family had lived on the suit property for more than 70 years without any form of interruption and that his late father was never involved in the previous suits.

23. The 2nd Defendant deponed that his family has never acceded to any claim that the suit property belongs to the Plaintiff; that him together with his family have never been evicted from the suit land since he was born and that his father took possession of the suit property in the year 1936.

24. In the Further Replying Affidavit, the 2nd Defendant deponed that one Peter Mutua Kivondo, as a labourer in Magutu Farm, used to farm parcel number 3566 and not 3565 as alleged; that it is untrue that until the year 2009, the suit property was vacant and that in the year 2008, one Grace Wanja Kanyarati attempted to evict his family from the suit property using the provincial administration which efforts were unsuccessful.

25. The 2nd Defendant deponed that by the time he was born, his parents and siblings were already living on the suit property; that it is untrue that they were living on Kaseku Farm as alleged by the Plaintiff; that his father's house was on the border of the suit property and Kaseku Farm and that as they grew up, they moved into the suit property and built their homes on the suit property.

26. The 2nd Defendant finally deponed that by the time his father's house was demolished in February, 2011, they had been in possession of the suit property since he was born; that his family has never conceded that the suit property belongs to the Plaintiff and that it is misleading for the Plaintiff to state that his family entered the suit property after it bought the land from Magutu Farm. The 4th Defendant did not respond to the Application.

Submissions:

27. The Plaintiff's advocate submitted that the Plaintiff herein purchased the suit property from Magutu Company Limited in the year 2009; that a transfer was registered in its favour and subsequently a Certificate of Title issued and that the Plaintiff's title has never been challenged by the Defendants in any way whatsoever and is therefore *prima facie* evidence of ownership.

28. It was submitted that the Certificate of Title produced by the Plaintiff is clear evidence that it is the sole absolute registered proprietor of the suit property; that the Defendants have not produced any evidence to counter it and that the registration of a person as the proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges associated with that status.

29. The Plaintiff's counsel relied on the case of ***Ochako Obinchu vs. Zachary Oyoti Nyamongo [2018] eKLR***, in which the Court held that:-

“The Plaintiff's title over the suit property is therefore not challenged on any of the grounds mentioned above or at all. In the absence of such challenge, I am enjoined by law to take the plaintiff on the basis of the title deed that he holds in his name to be the absolute and indefeasible owner of the suit property. As the absolute proprietor of the suit property, the plaintiff is entitled to enjoy rights and privileges associated with such ownership which includes exclusive use, possession and enjoyment thereof without interference by any third party.”

30. It was submitted by the Plaintiff's counsel that the 1st, 3rd and 4th Defendants herein, together with Kinyanjui Gakubu (*deceased*) who is the father of the 2nd Defendant, shortly after purchase of the suit property by the Plaintiff, unlawfully trespassed onto part of the suit property, took possession, began to harvest and cultivate crops, built both permanent and semi-permanent structures while knowing too well that they were not the owners of the suit property.

31. It was submitted that since the Defendants' case has always been that they don't occupy the suit property, in a consent order in Yatta Civil Suit No. 1 of 2011, the Court ordered that a survey be done to determine the boundaries between the suit property and the land that the Defendants occupied and that the survey report revealed that the Defendants, including the deceased father of the 2nd Defendant herein, were in illegal occupation of the Plaintiff's land.

32. Counsel submitted that the Defendants were subsequently evicted from the suit land and the structures that they had constructed thereon demolished; that when the 2nd Defendant's father, Kinyanjui Gakubu, died, his body was sneaked back into the suit property and buried in the dead of the night and that the 2nd Defendant thereafter unlawfully trespassed and returned to the suit property.
33. Counsel submitted that the continued occupation and trespass on the suit land by the Defendants is illegal and is in flagrant violation of the court order; that a further survey and sub-division that was conducted sometimes in September, 2017 once again revealed that the Defendants were in occupation of the suit property measuring about 30 acres, which trespass continues to date and that unfortunately, no further enforcement action could be taken in Yatta owing to the pecuniary jurisdiction of the court.
34. The Plaintiff's counsel submitted that the use and occupation of the property by the Defendants amounts to intrusion and trespass; that the Defendants have continued and persisted in trespassing and occupying the suit property without the registered owner's consent or permission; that the Defendants have denied and violated the Plaintiff's right of use and occupation of its parcel of land thereby occasioning the Plaintiff irreparable loss and damage and that the Defendants have no authority to remain on the suit land.
35. It was submitted that having proved that the Defendants did not have permission to enter onto the Plaintiff's land, it should be this Court's finding and holding that the said unlawful entry and occupation on the suit property amounts to trespass and a mandatory injunction ought to be issued ordering them to vacate the suit property.
36. Counsel submitted that it is instructive that in previous proceedings, the Defendants did not raise any defence of adverse possession because none was available; that besides, the Plaintiff had already taken steps to interrupt time from running since the Defendants trespassed on the suit property and that the former farm supervisor of the suit property and the Area Chief have deposed Affidavits as to when the Defendants trespassed the suit property. Counsel relied on numerous authorities which I have considered.
37. The 1st and 3rd Defendants' advocate submitted that the Limitation of Actions Act is clear on adverse possession; that the 1st and 3rd Defendants have been in occupation of Kaseku Farm for the last 60 years and that they are entitled to the ownership of the suit land.
38. It was submitted that pursuant to the third limb in **Giella vs. Cassman Brown**, it is clear that the balance of convenience tilts in favour of the 1st and 3rd Defendants who have been in occupation of the suit land for the last 60 years, made notorious, quiet and uninterrupted use of the land and even buried their great grandparents and grandparents on the same land.
39. It was submitted by the 1st and 3rd Defendants' advocate that as a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue; that equity does not aid an indolent party and that whoever approaches a court of equity must approach it with clean hands. Counsel submitted that it is shrewd for the Plaintiff to make a dishonest claim by misrepresenting actual and material facts.
40. Counsel submitted that the 1st and 3rd Defendants have occupied Kaseku Farm for the last 60 years without any interruption, and as such, they are entitled to possession and ownership of the same as they have been tilling and making economic use of the said land. It was submitted that this court is bound by the inherent duty to dispense justice where it is due as stipulated under Section 1A, 1B & 3A of the Civil Procedure Act.
41. Counsel submitted that this court is empowered with inherent jurisdiction to uphold the rights of the 1st and 3rd Defendants as the *bona fide* owners and users of Kaseku Farm which they have occupied for the last 60 years; that the Plaintiff's Application dated 16th September, 2020 is devoid of merit and should be dismissed with costs.
42. The 2nd Defendant's advocate submitted that the Plaintiff is guilty of material non-disclosure of facts critical to this case; that the Plaintiff was well aware or ought to have known that the 2nd Defendant's family have been in occupation of the suit land long before it acquired it and that the Plaintiff only sued the 2nd Defendant thus creating the impression that it is only the 2nd Defendant who is in occupation of the suit land. Counsel submitted that having sued the late Kinyanjui Gakubu previously, the Plaintiff very well knew that the entire family of the late Kinyanjui Gakubu is in occupation of the suit land.
43. The 2nd Defendant's advocate submitted the mischief behind the non-disclosure is self-revealing; that the Plaintiff wanted to portray the 2nd Defendant as a mere trespasser without any rights, and intended to use any orders of eviction issued against the 2nd Defendant indiscriminately as against the entire late Kinyanjui's family and that the effect of the foregoing non-disclosure is fatal. Counsel relied on the case of **Kilima Limited & Another vs. Samuel Ruto – Chairman & 21 Others (2021) eKLR** where Odeny J. held as follows:

“On the 2nd issue which is the elephant in the room on non-disclosure of material facts, the applications have unearthed many facts that the plaintiff did not disclose when the initial order was issued. Had these facts like the occupation of many families including the existence of many public utilities like schools, health center, cattle dips been disclosed then the best the court could have granted was an order of status quo. It should not escape the courts mind that the applicant had prayed for final orders which would have amounted to eviction of the defendants which the court declined to grant. There are many issues that the plaintiff failed to disclose like the current state of the suit land, and whether the land has changed hands. The issue of fraudulent transfer is to be determined at the trial but the plaintiff had a duty to disclose any purported transactions that had taken place. Non-disclosure of material facts amounts to coming to court with unclean hands. The order of injunction is an equitable remedy that requires good faith and clean hands. If your hands are tainted, then you must suffer the consequences especially when you are seeking the discretion of the court... This emphasizes the need for parties to come to court with honesty and integrity. Parties should not take advantage of the absence of the other party because when they finally come, the truth will always come out. When this happens then the offending party will have to shoulder the consequences of the dishonesty... I find that the plaintiff is a culprit of the concept of non-disclosure of material facts and therefore not entitled to the confirmation of the orders granted. I will therefore vary the order granted on 4th July, 2018 with an

order of maintenance of status quo pending the hearing and determination of this suit which should be heard on priority basis due to its nature.”

44. It was submitted that the Plaintiff is guilty of material non-disclosure of facts; that had it fully and frankly disclosed to this Court all relevant facts, the Court would not have issued final orders in the nature of eviction *ex-parte* and that the only recourse for such non-disclosure is vacation of the said orders.

45. It was submitted by the 2nd Defendant’s advocate that the Plaintiff has relied solely on two erroneous propositions to justify its prayers for a mandatory injunction order at this interlocutory stage: that it is a holder of the title to the suit land and that the 2nd Defendant is merely a meddlesome interloper and trespasser on the suit land.

46. Counsel submitted that the law on adverse possession is found in Sections 7, 9, 13 and 37 of the Limitation of Actions Act; that a person can acquire title to someone else’s land by continuously occupying it in a way that is inconsistent with the right of the owner and that if the person in adverse possession continues to occupy land, and the owner does not exercise his right to recover it by the end of the prescribed period of 12 years, the owner’s remedy as well as his title to the land are extinguished, and the High Court may order for the person to be registered as the proprietor of the land or lease in place of the person then registered as a proprietor of the land.

47. It was submitted that the late Kinyanjui Gakubu entered the suit land sometimes in the year 1936; that the suit land then was owned by Sir Percival Edward Litchfield and that by the time the Plaintiff was acquiring the suit land in 2009, the late Kinyanjui Gakubu had continuously and notoriously occupied and used the said land for a total of 73 years. It was submitted that since the 2nd Defendant herein and his siblings were born, they have been brought up and lived on the land, inherited it from their late father and have never known of any other land than the suit land.

48. Counsel submitted that the 2nd Defendant’s family acquired land rights to the suit land by way of adverse possession, more than 50 years prior to the Plaintiff’s purported acquisition of the suit land and that the 2nd Defendant’s family having met the threshold to acquire the title to the suit land long before the purported purchase, it essentially renders any subsequent transfer of title to the Plaintiff invalid and disabuses the supposition that the 2nd Defendant’s family are meddlesome interlopers and trespassers.

49. It was submitted that there is an Affidavit on record sworn by the wife of one of the Directors of Magutu Company that purportedly sold the suit land to the Plaintiff, pointing out to the fact that the late Kinyanjui’s family was in occupation of the suit land long before the Plaintiff purportedly acquired title to the suit land; that the current administration as well as the neighbours of the 2nd Defendant’s family have confirmed that the 2nd Defendant’s family have been in occupation of the suit land for more than 5 decades and that there is not a single document on record that supports the Plaintiff’s contention that what is there is a boundary and not an ownership of land dispute.

50. It was submitted that it is commonplace that at an interlocutory stage, this Court can only grant a mandatory injunction sparingly, and only in the clearest of cases where there are special circumstances to the effect that the Plaintiff’s case is overwhelmingly strong, plain and clear and the Defence is intended to achieve nothing other than delayed justice.

51. Counsel submitted that the Plaintiff’s case however does not meet the threshold for this Court to issue a mandatory order of injunction at an interlocutory stage; that the Plaintiff’s case does not disclose any special circumstances that warrants the orders sought and that the Plaintiff’s case is not overwhelmingly strong, plain and clear.

52. Counsel submitted that there are only two events whose occurrence of either or both of them may effectively interrupt time from running in a claim of adverse possession and that the two events were elucidated by the Court of Appeal in the case of **Githu vs. Ndeete [1984] KLR 776** as follows:

“Time ceases to run under the Limitations of Actions act either when the owner takes or asserts his right or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes effective entry into land, giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.”

53. Counsel submitted that the right of adverse possession first accrued to the late Kinyanjui Gakubu who raised the 2nd Defendant together with his other siblings; that upon his death in 2011, the 2nd Defendant together with his siblings continued with the possession of the suit land and that the said possession has never been broken since the year 1936 when the late Kinyanjui Gakubu settled on the said land.

54. It was submitted that where one trespasser is succeeded by another trespasser, time is not broken and that the succeeding trespasser is entitled to the combined period of trespass. Counsel relied on the case of **Amos Weru Murigu vs. Marata Wangari Kambi & Another, High Court of Kenya at Nairobi (Civil Suit No. 33 of 2002(O.S))** where the Court stated as follows:-

“...Where the period of 12 years is not continuous or is interrupted, the period of adverse possession is broken and must start all over again. But where one trespasser removes another trespasser who is in adverse possession to the owner and continues to occupy the land, the period of adverse possession is not broken and the second trespasser is entitled to combine the period of trespass of the first trespasser to his own...”

55. It was submitted by the 2nd Defendant’s advocate that the Plaintiff having not interrupted time by acquisition of title and being common ground that the 2nd Defendant has never admitted the alleged Plaintiff’s claim of ownership of the suit land, the Plaintiff cannot claim to have asserted its rights in a manner that interrupted time from running and that the Plaintiff has admitted that it has never filed a case claiming title and/or ownership of the suit land.

56. Counsel submitted that the grant of a mandatory injunction at this interlocutory stage will be antithetical to the principles of equity, justice and fairness and that the competing facts and positions pleaded by the parties disclose that the Court is safer preserving the *status quo* than issuing orders that are so disruptive and preemptive of the main suit.

Analysis and findings:

57. In the Application dated 16th September, 2020, the Plaintiff has sought for the eviction of the Defendants from a parcel of land known as L.R. No. 3565 situate in Kikomba area within Machakos County (*the suit property*) pending the hearing of the suit. According to the Plaintiff, it is the absolute registered owner of the suit property which it bought from Magutu Company Limited sometimes in the year 2009 free from any encumbrances and or adverse claim from third parties.

58. It is the Plaintiff's case that sometimes between August, 2009 to December, 2009, the 1st, 3rd and 4th Defendants, together with one Kinyanjui Gakubu, the deceased father of the 2nd Defendant, trespassed, entered and occupied the Plaintiff's property, where they started cultivating and harvesting crops and that it filed civil suit no. 1102 of 2009 at the Thika Chief Magistrate's Court against the 1st, 3rd & 4th Defendants and one Kinyanjui Gakubu (*deceased*).

59. The Plaintiff's case is that Thika CMCC No. 1102 of 2019 was not determined on its merits and was withdrawn for want of territorial jurisdiction; that the Plaintiff thereafter filed SRMCC No. 1 of 2011 at Yatta Law Courts seeking eviction orders against the 1st, 3rd & 4th Defendants and one Kinyanjui Gakubu (*deceased*) and that in their Defence to that suit, the Defendants pleaded that they were squatters who occupied trust/government land to which no Title Deed had been issued.

60. According to the Plaintiff, in their Defence to the Yatta suit, the Defendants pleaded that they were neighbours to the suit property and that their parcel of land is known as Kaseku Farm to which no Title Deeds have been issued and that the parties agreed to an out of court settlement on the basis of a survey report to be prepared by the District Land Surveyor which would be binding on all parties.

61. It is the Plaintiff's position that based on the said consent order, and a survey report having shown that the Defendants occupy a portion of the suit property, they should be evicted pursuant to the consent order.

62. The circumstances under which the court would grant a mandatory injunction was stated by the Court of Appeal in the case of ***Maher Unissa Karim vs. Edward Oluoch Odumbe [2015] eKLR***, as follows:

*'The test for granting a mandatory injunction is different from that enunciated in the **Giella vs Cassman Brown** case which is the locus classicus case of prohibitory injunctions. The threshold in mandatory injunctions is higher than in the case of prohibitory injunctions and the court of appeal in the case of Kenya Breweries Ltd vs Washington Okeyo (2002) EA 109 had occasion to discuss and consider the principles that govern the grant of mandatory injunctions. The Court of Appeal held that the test for grant of a mandatory injunction was correctly stated in VOL 24 of Halsbury's Laws of England 4th Edition paragraph 948 which states as follows:*

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a match on the plaintiff, a mandatory injunction will be granted on an interlocutory application.

In the English case of Locabail International Finance Ltd vs Agro Export & Another (1986), ALL ER 901 which the Court of Appeal in Kenya has cited with approval in many decisions, the court held that: -

"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 easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory injunction, the court has to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than required for a prohibitory injunction."

63. The above decision was cited with approval by the Court of Appeal in the case of ***Shariff Abdi Hassan vs. Nadhif Jama Adan CA 121/2005 (2006) eKLR*** by further observing that:-

"The courts have been reluctant to grant a mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standard spelt out in law as stated above that a party against whom a mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for the full hearing of the entire case. That position could be taken by the courts in such cases as those of alleged trespass to property."

64. The same Court of Appeal in the case of ***Jaj Super Power Cash and Carry Ltd vs. Nairobi City Council & 20 others CA 111/2002*** stated:

"This court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it."

65. The documents produced before this Court by the Plaintiff shows that it is the absolute registered owner of the suit property. According to the copy of the title annexed on the Plaintiff's Director's Affidavit, the Plaintiff was registered as the proprietor of L.R. No. 3565 on 23rd April, 2009 having purchased the same from Magutu Company Limited.

66. The 1st and 3rd Defendants have deponed that they occupy Kaseku Farm and not L.R. No. 3565; that at the time the Plaintiff purchased L.R. No. 3565, they were still residing on Kaseku Farm and that the Plaintiff is hell bent on taking their land in the pretext that the area they occupy is part of L.R. No. 3565. The 1st and 3rd Defendants did not dispute the existence of the consent order in SRMCC No. 1 of 2011 dated 3rd February, 2011.

67. The 2nd Defendant admitted that the late Kinyanjui Gakubu, the 3rd Defendant in the Yatta case, is his deceased father. According to the 2nd Defendant, his late father has always been on the suit land since the year 1939, and that he was born on the suit land. The 2nd Defendant deponed that he is entitled to the suit land by way of adverse possession, and that even after their houses were demolished in the year 2011, they reconstructed them in the same year.

68. In the consent that was recorded in the Yatta case, the 1st Defendant herein, together with the 2nd Defendant's late father agreed as follows:

"1. That the District Land Surveyor Yatta District in conjunction with the Survey of Kenya do demarcate the boundaries between the Plaintiff's land and the area occupied by the 1st and 3rd Defendants and do prepare a report to be filed in court within the next 60 days.

2. That in the event that the 1st and 3rd defendants have encroached or trespassed on the Plaintiff's land, they shall forthwith vacate and the prayers sought in prayer 4 and 5 of the Plaintiff's Chamber Summons dated 18th January, 2011 shall stand confirmed as against the 1st and 3rd Defendants.

3. That in the first instance, the Plaintiff shall bear the cost of the survey and report above but in the final analysis the offending party shall be liable for the costs.

4. That costs shall be in the cause."

69. Pursuant to the above consent order, the Machakos District Surveyor prepared a report dated 18th April, 2011, which report was filed in the Yatta case on 20th April, 2011. The same report has been exhibited on the Plaintiff's Director's Affidavit. In the report, the Surveyor states as follows:

"...1st Defendant - Francis Kamau Guchu - occupies and cultivates an area measuring 13.54 acres which is L.R. No. 3565.

3rd Defendant - Kinyanjui Gikubu - occupies and cultivates an area measuring 22.09 acres or thereabouts which is in L.R. No. 3565. He has also constructed a semi-permanent house inside the area of occupation.

2nd Defendant - Kamau Waweru - occupies and cultivates an area measuring 9.10 acres or thereabouts which is in parcel L.R. No. 3565. He has also constructed three temporary houses and one permanent house.

4th Defendant - Lukas Mutua - occupies and cultivates an area measuring 6.15 acres or thereabouts which is parcel number L.R. No. 3565."

70. The 1st Defendant herein was the 1st Defendant in the Yatta case while the 2nd Defendant's late father was the 3rd Defendant in the said case. The 3rd Defendant herein was the 2nd Defendant in the Yatta case while the 4th Defendant was the 4th Defendant in the Yatta case.

71. The 1st Defendant has not disputed that indeed they recorded the above consent in the Yatta case. Indeed, the said Defendant, just like in the Yatta case, still holds the position that he occupies Kaseku Farm and not the suit property. This is the same position that the 3rd Defendant herein has taken. Although the 2nd Defendant has deponed that his father, who was the 3rd Defendant in the Yatta case was never served with pleadings in Yatta SRMCC No. 1 of 2011, he has made the following admission in his Supplementary Affidavit:

"By the time our father's houses were brought down sometime in February 2011, we had been in possession of the suit land since I was born and had found my father there. Even after the said unlawful destruction of my late father's house, we reconstructed it and continued staying in the said land."

72. The 2nd Defendant has admitted that they were indeed evicted from the suit property. On the basis of the said admission, the 2nd Defendant has not informed this court why his late father, or himself, never sought to set aside the consent order especially after their structures were demolished in the year 2011 on the basis of the Yatta consent order.

73. Indeed, the evidence before me shows that all the Defendants herein attempted to challenge the proceedings in Yatta case vide Machakos High Court Miscellaneous Application number 155 of 2011 (JR) which was dismissed by the court for want of prosecution on 7th July, 2015, which is more than five years ago. The Defendants have never filed any other suit challenging the said proceedings or the consent order.

74. The Defendants in this case have never raised the issue of their right over the suit land by way of adverse possession in the previous two suits. Indeed, the issue of the 2nd Defendant's family having been on the suit land was never raised by his late father in the Thika and Yatta cases. The issue of the Defendants being entitled to the suit property by way of adverse possession is therefore an afterthought and not maintainable.

75. The consent order dated 2nd March, 2011 in respect of L.R. No. 3565 that the Defendants herein signed, including the 2nd Defendant's father, in Yatta SRMCC No. 1 of 2011 admitting the Plaintiff's claim, which consent has never been challenged by the Defendants; the eviction of the Defendants from the suit property in the year 2011 pursuant to the said consent, which eviction has never been challenged; and the fact that litigation must come to an end, leads me to the conclusion that this is a suit in which a mandatory injunction should issue.

76. There exists special circumstances in the Plaintiff's case in that this court cannot aid the Defendants to continue with their acts of occupying the Plaintiff's land known as L.R No. 3565 even after agreeing to move out of the land by way of a consent order.

77. For those reasons, I allow the Plaintiff's Application dated 16th September, 2020 as follows:

a) That pending the hearing and determination of this suit, an order be and is hereby issued compelling the Defendants, their servants, agents and/or whomsoever to remove all structures erected on L.R. No. 3565 and all those parties claiming title under them do vacate the property on the basis of the survey report dated 18th April, 2011 within 30 days of the date of this Ruling.

b) The Officer Commanding Kikomba Police Post to enforce the Court orders issued herein.

c) The Defendants to pay the costs of the Application.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF MARCH, 2021.

O.A. ANGOTE

JUDGE