



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 230 OF 2020 (OS)

HAMISI JUMA MWAMAD & 6 OTHERS.....APPLICANTS

VERSUS

MOMBASA TEACHERS COOPERATIVE SAVINGS AND CREDIT SOCIETY

LIMITED.....RESPONDENT

RULING

(Application for injunction; principles to be applied; applicants claiming adverse possession of land and asserting that they were born on the land; identity cards of the majority of the claimants showing that they were born in other counties and not where the suit land is located; evidence of occupation being contained in photographs which are not accompanied by any report that the said photographs actually depict the status of the claimed land; court not persuaded that from the evidence, a prima facie case has been established; application dismissed with costs)

1. This suit was commenced through an Originating Summons that was filed on 20 December 2019 vide which the applicants claim ownership of the land parcel LR No. 3634/II/MN, CR No. 24635 by way of adverse possession. Upon service, the respondent opposed the Originating Summons through the replying affidavit of Jonah Mutuku which was filed on 19 June 2020. On 22 October 2020, the applicants filed an application seeking orders of injunction to restrain the respondent from interfering with their possession of the suit land pending hearing and determination of this case. It is that application which is the subject of this ruling. The same is opposed by the respondent.
2. This is an application for injunction and the principles upon which a court will assess such an application were laid down in the case of *Giella vs Cassman Brown (1973) EA 358*. An applicant needs to demonstrate a prima facie case with a probability of success; show that he/she stands to suffer irreparable loss that cannot be compensable by an award of damages; and where the court is in doubt, it will decide the application on a balance of convenience.
3. In order to determine whether or not a party has established a prima facie case, inevitably, the court will need to make an assessment of the case of the applicant, based on the material so far presented by the parties. What then is the case of the applicants?
4. The case of the applicants is that they deserve ownership of the suit land by way of adverse possession as they were born there. They have averred that they were respectively born on the suit land in the years 1989, 1991, 1960, 1952, 1983, and 1959. They claim that upon entry into the suit land, they established their respective homesteads. To support their claim, they annexed some letters dated 21 November 2019 and 27 November 2019, some photographs, copies of some certificates of birth, copies of school leaving certificates, and their identity cards. They contend that they have been on the land without the authority of the respondent, who is the registered proprietor, and that the respondent has never been in occupation. They state that their period of occupation has been exclusive, *nec vi, nec clam, nec precario*. In their application, they state that the respondent has initiated several covert and overt attempts at disrupting their possession, inter alia by threatening to evict them, thus the need for an order of injunction.
5. The respondent in opposing the Originating Summons, and the application, filed a replying affidavit sworn by Jonah Mutuku, the Chairman of the respondent. He has referred to the identity cards presented by the applicants and has deposed that they do not show that the applicants were born on the suit land. He has pointed out that in fact, some of those identity cards reveal that some of the applicants were born in Kwale and Kilifi. He has referred to the Certificates of Birth annexed by the applicants and has deposed that they are for the family of one Robert Muhambi Katana and Grace Munyazi Tunje. He has deposed that Robert Katana was a litigant in a previous suit, Mombasa ELC No. 20 of 2012, where he and others sought to claim the same land by way of adverse possession. He has deposed that in that case, Robert Katana sued on his own behalf and on behalf of the squatters residing on the suit land. He has annexed the judgment in that suit and also the judgment of the Court of Appeal arising from the same suit, which resulted in the dismissal of the claim for adverse possession and an order giving the respondent leeway to evict the claimants in that case. He is thus of opinion that this suit is *res judicata*.

6. The applicants filed a supplementary affidavit but I see nothing significantly new that is raised in the same.
7. I invited counsel to file written submissions on the application and I have read and considered the submissions filed by Mr. Ngonze, learned counsel for the applicants, and Mr. Bosire, learned counsel for the respondent.
8. There is an issue raised that this suit is res judicata but I am not so persuaded, at least at this stage of the proceedings. I have seen the previous suit for adverse possession, which was dismissed by the Court of Appeal, but I have little evidence that the parties therein are the same parties here, though I wonder why the applicants herein annexed birth certificates of the children of Richard Katana, who was one of the applicants in the dismissed cases. I will not dwell too much on the issue of res judicata, suffice to state that if the respondent is of opinion that this suit is res judicata, she is at liberty to file a formal application for consideration.
9. On the substance of the application, the case of the applicants is hinged mainly on the claim that they were born on the land and they have given their various years of birth as I have outlined earlier in this ruling. When I look at the identity cards that they have presented, only two show that the applicants were born in Mombasa, that is the 2nd and 3rd applicants. The others were born in Kwale and Kilifi. This casts doubts on the veracity of the allegation that the applicants were born on the suit land, for it is indeed a fact, that the suit land is neither in Kwale nor Kilifi. To prove their occupation, all that the applicants have presented are still photographs showing an expansive settlement. I have no evidence that what is depicted in those photographs is the suit land. I must say that it is quite risky to try and prove possession of land merely on photographs without there being evidence, say through an expert report, that the said photographs are of the actual land being claimed. Moreover, save for stating that they have their homesteads on the suit land, I have no ground report to support this, and neither is the actual individual occupation of each claimant demonstrated. Given these gaps, I am afraid that I am unable to hold that the applicants have demonstrated a prima facie case with a probability of success. With that finding, the application must fail and it is not necessary for me to address the issues of substantial loss or balance of convenience.
10. For the above reasons, this application is hereby dismissed with costs. The result is that the applicants will need to prove their case without the benefit of an order of injunction.
11. Orders accordingly.

DATED AND DELIVERED THIS 21ST DAY OF MAY 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA.