



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. E12 OF 2021(OS)

MORRIS MUUMBA NDETI

KIMILU MULONZI

BENEDICT MUSYIMI

JUSTUS MUEMA MUTHOKA

BENJAMIN NDUNDA

PAUL MAINGI

HARISON NGUL.....PLAINTIFFS

(Suing on their behalf and as officials of

KASEVE WELFARE SOCIETY)

VERSUS

HARP HOUSING LIMITED.....DEFENDANT

RULING

1. In the Notice of Motion dated 30th April, 2021, the Defendant has prayed for the following orders:

a. That this Honourable Court be pleased to direct that the Court file for ELC. No. 20 of 2020 – Kaseve Welfare Society vs. Harp Housing Ltd be placed before this Honourable Court during the hearing of this Application.

b. That this Honourable Court be pleased to discharge, vary and/or set aside the ex-parte Orders dated 28th April, 2021.

c. That this Honourable Court be pleased to strike out the entire suit herein in limine and consequential orders herein under the doctrine of sub judice and abuse of the court process.

d. That this Honourable Court do issue any other or further orders that it may deem just and fit.

e. That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of the Defendant's Director's Affidavit who has deponed that on 6th June, 2005, the Defendant bought land known as L.R. No. 337/1002 measuring approximately 20.47 Ha situated in Mlolongo area, Machakos County (*the suit property*) and that the suit property was later sub-divided.

3. According to the Defendant's Director, the Defendant put up 417 units of Bungalows on the suit property; that the remaining portion of the suit property was sub-divided into L.R. No. 337/5371 and 337/5372 measuring approximately 4.269 Ha and 4.268 Ha respectively valued at about Kshs. 600,000,000 and that the Defendant has been in possession of the said land since then.

4. It is the Defendant's case that the Plaintiffs instituted a suit in the Chief Magistrate's Court at Milimani being CMCC No. 2196 of 2020 and misled the lower court to issue *ex-parte* orders of injunction; that the lower court directed the OCS and the OCPD Athi River to file a

Report on the prevailing status in respect to L.R. Nos. 337/5371 and 5372 and that the said Report was filed in court on 28th July, 2020.

5. According to the Defendant's Director's Affidavit, the Report filed by the police as directed by the court showed that the Plaintiffs used the orders of 9th June, 2020 issued by the lower court to invade the suit property on 11th June, 2020 and that on 7th August, 2020, the lower court struck out with costs the Plaintiffs' suit for want of pecuniary and territorial jurisdiction.

6. After the lower court struck out CMCC No. 2196 of 2020, it was deponed by the Defendant's Director that the Plaintiffs filed Machakos ELC. No. 64 of 2020; that on 2nd October 2020, this court dismissed the Plaintiffs' Application for injunction and ordered the Plaintiffs to deposit Kshs. 1 million as security for costs within thirty (30) days and that the Plaintiffs have never complied with the said orders.

7. The Defendant's Director deponed that while disguising its claim as one of adverse possession, and while seeking the same orders as in the lower court and ELC No. 64 of 2020, the Plaintiffs filed the current suit; that on 28th April, 2021, this court was misled to grant injunctive orders against the Defendant and that the Defendant was condemned unheard.

8. It is the Defendant's case that the Affidavit of Service sworn by Mr. Kinyatta is false because the Defendant was never served with any court process; that the existence of this suit was brought to their attention when the Plaintiffs descended upon the suit premises with the order of 28th April, 2021 and that the Plaintiffs lack the locus to file this suit because they are not a registered Society.

9. The Defendant's Director deponed that the orders of this court dated 28th April, 2021 should be set aside on the grounds that the Plaintiffs failed to disclose material information pertaining to this matter and ELC. No. 64 of 2020; that the Plaintiffs act of filing this case and obtaining orders is mischievous, unjust and illegal tactics to obtain orders from various courts and destroy property and that the Plaintiffs misled this court by stealing a march against the Defendant which in itself is an abuse of the court process.

10. According to the Defendant, the Plaintiffs' deposition that it had occupied part of the suit property measuring 8.5 acres is false and misleading; that the Plaintiffs' Letter of Allotment does not confer a proprietary right over the suit property and that the Plaintiffs have never taken possession of the suit property or a portion thereof.

11. The Defendant's Director finally deponed that the Plaintiffs are foraying onto the suit property in a bid to stealthily dispossess the Defendant; that the Letter of Allotment cannot override a duly registered title under the law and that the orders prayed for should be granted.

12. In response to the Application, the 1st Plaintiff deponed that the matter before this court is different from the previous ones and therefore cannot be sub-judice and that this matter is anchored on the doctrine of adverse possession because the Defendant mischievously proceeded to obtain titles to the suit property.

13. It was deponed by the 1st Plaintiff that the issues for determination in ELC. No. 64 of 2020 and the issues before this court are entirely different in that in the present suit, the court is to determine whether the Plaintiffs meet the threshold of adverse possession.

14. According to the 1st Plaintiff, the Plaintiffs did instruct their previous advocates in Machakos ELC. No. 64 of 2020 to withdraw the suit because the approach the advocates had adopted was not appropriate and in particular after realizing that the Defendant had obtained a title to the suit property.

15. The 1st Plaintiff deponed that in addition, the Plaintiffs realized that in ELC No. 64 of 2020, they had moved the court as "*Kaseve Welfare Society*" in breach of the Societies Act thus rendering the suit incompetent; that the Plaintiffs herein are the *bona fide* members of the Society and that they have since withdrawn ELC No. 64 of 2020.

16. The 1st Plaintiff deponed that although the government recognized their long peaceful and uninterrupted occupation of the suit property and issued them with a Letter of Allotment, the government went behind their backs and issued the Defendant with a Letter of Allotment and a title over the same land.

17. The 1st Plaintiff finally deponed that the Defendant was served with the Application for injunction; that they are not trespassers on the suit property but they are the legitimate adverse possessors of the suit property and that the current Application is meant to disrupt the running of time in their favour besides attempting to destroy their evidence.

18. The advocates for both parties appeared before me and made oral submissions. The Defendant's advocate submitted that the suit is a classical example of what abuse of the court process is; that there are two pending suits in this court between the same parties and in respect to the same suit property and that the court determined the Plaintiffs' Application for injunction in ELC. No. 64 of 2020.

19. It was submitted by counsel for the Defendant that although the Plaintiffs were ordered to deposit Kshs. 1,000,000 as security for costs in ELC. No. 64 of 2020, they have never done so; that this suit should be struck out for being an abuse of the court process and that the Plaintiffs did not disclose to this court the existence of ELC No. 64 of 2020.

20. It was submitted that the Plaintiffs are litigating in instalments; that the Plaintiffs should have canvassed the issue of adverse possession in ELC. No. 64 of 2020; that the Plaintiff had made the court deliver two conflicting decisions and that the Plaintiffs are subjecting the Defendant to suffer immense costs in litigation.

21. The Defendant's counsel submitted that the Plaintiffs are subjecting this court to ridicule by filing numerous suits in respect to the suit property; that the Plaintiffs have now purported to file a Notice of Withdrawal of ELC. No. 64 of 2020 without the leave of the court and that

this is a perpetuation of the abuse of the court process. According to counsel, this is a suit fit for striking out.

22. Counsel for the Plaintiffs submitted that in ELC. No. 64 of 2020, the court found the suit to be incompetent; that the said suit has now been withdrawn; that the Defendant was properly served with the court process and that the Defendant did not summon the process-server for cross-examination.

23. Counsel for the Plaintiffs submitted that the Plaintiffs have demonstrated their claim for adverse possession; that the Plaintiffs can only claim the suit land by way of adverse possession and that costs can only be paid after they have been taxed. According to the Plaintiffs' counsel, the Plaintiffs should be allowed to continue occupying the suit property.

24. In a brief rejoinder, the Defendant's advocate submitted that withdrawal of ELC. No. 64 of 2020 should have been done prior to filing of this suit; that the Plaintiffs never mentioned in their pleadings the existence of the previous suits and that the filing of the Notice of Withdrawal alone does not amount to withdrawal of the suit.

25. On the issue of service of pleadings, the Defendant's advocate submitted that the Affidavit of Service does not indicate how he served the Defendant and that the issue of occupation of the suit property by the Plaintiffs has been key in all the past litigations.

Analysis and findings:

26. This suit was commenced by way of an Originating Summons dated 8th April, 2021. In the Originating Summons, the Plaintiffs are seeking the court to determine the following questions:

a. Whether the Applicants have acquired title to and are entitled to be registered as proprietors of various land sizes as captioned in the Supporting Affidavit of this Originating Summons in land Parcel No. 337/1002 located in Athi River Sub-County in Machakos County and or any subsequent sub-division thereto situated in land Parcel No. 337/1002 located in Athi River Sub-County in Machakos County by way of adverse possession.

b. Whether the Applicants are entitled to a declaration that they have acquired titles to L.R. No.337/1002 in Athi River County by adverse possession and to an order that a Certificate of Title be issued in the name of each Applicant in terms of acreage each Applicant is occupying as the proprietor of land Parcel No. 337/1002 located in Athi River Sub-County in Machakos County and or any subsequent sub-division thereto.

c. Whether the Applicants are entitled to the cost of this suit.

27. Alongside, the Originating Summons, the Plaintiffs also filed a Notice of Motion dated 8th April, 2021 in which they sought for the following orders:

a. That a temporary injunction be issued restraining the Defendant herein either by themselves, agents, servants, proxies and or employees from entering, evicting, sub-dividing, trespassing, re-surveying, beaconing, alienating, selling, fencing, demolishing houses claiming ownership and or interfering with land Parcel No. 337/1002 located in Athi River Sub-County in Machakos County pending the hearing and determination of this suit.

b. That the cost of this Application be provided.

28. The Application dated 18th April, 2021 seeking for injunctive orders restraining the Defendant or its agents from trespassing, alienating, claiming ownership or interfering with parcel of land number L.R. No. 337/1002 is premised on the ground that the Plaintiffs are the lawful owners of the suit property by way of adverse possession.

29. The Application is supported by the Affidavit of the 1st Plaintiff, who has described himself as the Chairman of *Kaseve Welfare Society*, while the 2nd and 3rd Applicants are described as the Secretary and Treasurer of the Society respectively.

30. In the Affidavit, the 1st Plaintiff deponed that the Defendant is the registered proprietor of L.R. No. 337/5371 and 337/5372; that initially, the two parcels of land were part of L.R. No. 337/1002 which the Plaintiffs had occupied and that having lived on the land for many years, the government issued them with a Letter of Allotment.

31. According to the Plaintiffs, while they were still in occupation of L.R. No. 337/1002, the Defendant acquired the land, sub-divided it into several portions, developed housing units on one of the portions of the suit property and that they (*the Plaintiffs*) continued occupying the remaining portions. According to the Plaintiffs, their occupation of the suit property has been continuous and uninterrupted and that the Defendant was curtailing the free movement of their members on the suit property.

32. The record shows that on 13th April, 2021, the Plaintiff's Application for injunction dated 8th April, 2021 came up for hearing *ex-parte* under a Certificate of Urgency. On the said date, the court certified the Application as urgent and fixed the matter for hearing *inter partes* on 28th April, 2021.

33. On 28th April, 2021, the Plaintiffs' advocate informed the court that although the Application had been served on the Defendant, the Defendant had not filed any response, and that the Application should be allowed because it was unopposed. The court allowed the Application as follows:

“The Notice of Motion dated 9th April, 2021 is not opposed. I have read it and heard counsel [for the Plaintiffs]. I allow the Application in terms of prayer number 3.”

34. Prayer number 3 of the Application which this court allowed reads as follows:

“That a temporary injunction be and is hereby issued restraining the Defendant herein either by themselves, agents, servants, proxies and or employees from entering, evicting, sub dividing, trespassing, re-surveying, beaconing, alienating, selling, fencing, demolishing houses, claiming ownership and or interfering with land parcel NO. 337/1002 in Athi River Sub County pending the hearing and determination of this suit.”

35. When the order of 28th April, 2021 was served on the Defendant, the Defendant, under a Certificate of Urgency, filed the current Application in which they have not only sought to set aside the orders of this court of 28th April, 2021, but also to have the entire suit struck out for being an abuse of the court process.

36. On the basis of the pleadings of the parties and the submissions by counsel, the issues that that this court is supposed to determine are as follows:

- a. Whether the Originating Summons and the Notice of Motion dated 8th April, 2021 were served on the Defendant;*
- b. Whether there was material non-disclosure on the part of the Plaintiffs;*
- c. Whether the filing of this suit was an abuse of the court process.*
- d. Which orders should issue in this matter.*

37. According to the Affidavit of Service of the process-server, on 15th April, 2021, he received an Application under a Certificate of Urgency and the Originating Summons both dated 8th April, 2021 from the Plaintiffs’ advocate to effect service on the Defendant.

38. The process-server has deponed that on the same day (15th April, 2021), he proceeded to Westlands and “*after investigations*”, he was informed that the Defendant’s Company is based at Museum Hill in a building known as Purshotta M. Place; that after arrival at the said building, he went to the offices of the Defendant on the fifth floor and upon arrival, introduced himself to a secretary and the purpose of his visit and that he served the secretary with the court documents.

39. The process-server further deponed that the said secretary acknowledged receipt of the copies of process but declined to sign his copies and that the secretary informed him that she will forward the court documents to their Company lawyers to defend the Company. The Defendant’s Director has denied that they were ever served with the said court documents.

40. The law governing service of summons and Applications is Order 5 of the Civil Procedure Rules. Order 5 Rule 15 (1) of the Civil Procedure Rules provides as follows:

“The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time, when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.”

41. The process server is required by the law to state in the Affidavit of Service how he identified the person he was serving, and state the name of the person he served. In the Affidavit of Service filed in this court, the process server did not state how he knew where the Defendant’s company is situated and the person who identified to him the Defendant’s Secretary or the Defendant’s offices.

42. All that the process server stated was that after *investigations*, he was informed where the company is situated without informing the court the source of his information. The process server who swore the Affidavit of Service did not comply with the basic requirements of Order 5 Rule 15 (1) of the Civil Procedure Rules.

43. Indeed, where the Affidavit of Service is not in conformity with the provisions of Order 5, the process server need not to be cross examined for the court to determine the veracity of his deposition. Having not complied with the provisions of Order 5 Rule 15 (1) of the Civil Procedure Rules, it is my finding that the Defendant or its authorized agents were never served with the Originating Summons and the Notice of Motion dated 8th April, 2021 as alleged by the process server.

44. The next issue I should deal with is whether the Plaintiffs are guilty of material non-disclosure. The principle of material non-disclosure, which is sometimes known as the principle of **Republic vs. Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac [1917] 1 KB 486**, is well known and has been consistently applied in this country. Warrington LJ set out the principle as follows:

“It is perfectly well settled that a person who makes an ex parte application to the Court - that is to say, in the absence of the person who will be affected by that which the Court is asked to do is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any

advantage from the proceedings and he will be deprived of any advantage may have already obtained by him. That is perfectly plain and requires no authority to justify it.”

45. In the case of *The owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited (1989) eKLR*, Kwach JA considered the authority of *Brink’s MAT Ltd vs. Elcombe [1988] 3 ALL ER CA 188* in which the *Kensington Income Tax Commissioners* case (*supra*) had been applied and in which Slade LJ had emphasized the penal nature of the principle in this way:

“Nevertheless, the nature of the principle, as I see it, is essentially penal and in its application the practical realities of any case before the court cannot be overlooked. By their very nature, *ex parte* applications usually necessitate the giving and taking of instructions and the preparation of the requisite drafts in some haste. Particularly in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making *ex parte* applications, I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom *ex parte* injunctions have been granted, or of their legal advisers, to rush to the *R v Kensington Income Tax Commissioner* principle as a *tabula in naufragio*, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience.”

46. In his leading judgment in the *Brink’s MAT* case (*supra*) at 193-194, Ralph Gibson LJ dwelt comprehensively on the issue of non-disclosure and its consequences which deserve to be fully set out as follows:

“In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following:

i. The duty of the applicant is to make a ‘full and fair disclosure of all the material facts’: see *R v Kensington Income Tax Comrs, ex parte Princess Edmond de Polignac [1917] 1 KB 486 at 514 per Scrutton LJ*.

ii. The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see the *Kensington Income Tax Comrs case [1917] 1 KB 486 at 504 per lord Cozens-hardly MR*, citing *Dalglish v Jarvie [1850] 2 Mac & G 231 at 238, 42 ER 89 at 92*, and *Thermax Ltd v Schott Industrial Glass Ltd [1981] FSR 289 at 295 per Browne-Wilkinson J*.

iii. The applicant must make proper inquiries before making the application: see *Bank Mellat v Nikpour [1985] FSR 87*. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

iv. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller Order in *Columbia Picture Industries Inc v Robinson [1986] 3 All ER 338, [1987] Ch 38*, and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *Bank Mellat v Nikpour [1985] FSR 87 at 92-93 per Slade LJ*.

v. If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains ...an *ex parte* injunction without full disclosure is deprived of an advantage he may have derived by that breach of duty’ see *Bank Mellat Nikpour (at 91) per Donaldson LJ*, citing *Warrington LJ in the Kensington Income Tax Comrs case*.

vi. Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

vii. Finally, ‘it is not for every omission that the injunction will be automatically discharged. A *locus poenitentiae* may sometimes be afforded’; see *Bank Mellat v Nikpour [1985] FSR 87 at 90 per lord denning MR*. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to continue the order, or to make a new order on terms:

‘... When the whole of the facts, including that of the original non-disclosure, are before it, [the court] may well grant such second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.’

47. It is not in dispute that the Plaintiff herein, *Kaseve Welfare Society*, is also a Plaintiff in *Machakos ELC No. 64 of 2020*. In *Machakos ELC No. 64 of 2020*, *Kaseve Welfare Society* sued the Defendant in respect of *LR No. 337/1002* and the sub divisions thereof. That is the same property that is the subject of this proceedings.

48. The record in *Machakos ELC No. 64 of 2020* shows that alongside the Plaintiff, the Plaintiffs herein also filed an Application for injunction in the following terms:

a. Pending the hearing and determination of this Application, the Honourable Court be pleased to grant injunctive orders against the Defendant either by itself or its servant, employees and or agent restraining them and any other persons from encroaching onto, or in any manner whatsoever alienating or charging or interfering with the Plaintiff's right to access, use and enjoy of Residential Plot L.R No. 337/1002-Athi River.

b. Pending the hearing and determination of this suit, the Honourable Court be pleased to grant injunctive orders against the Defendant either by itself or its servant, employees and or agent restraining them and any other persons from encroaching onto, or in any manner whatsoever alienating or charging or interfering with the Plaintiff's right to access, use and enjoy of Residential Plot L.R No. 337/1002-Athi River.

49. The Application that the Plaintiffs filed in Machakos ELC No. 64 of 2020 was premised on the grounds that that the Plaintiff (Kaseve Welfare Society) is the *bona fide* owner of land known as L.R. No. 337/1002, Athi River; that since the issuance of the letter of allotment, the Plaintiff's members have been in possession of the land and that in May, 2020, the Plaintiff's members noticed some unknown persons claiming to be agents of the Defendant inspecting the suit property in what appeared to be a scouting of the property and showing of the property to prospective buyers.

50. In the said suit (ELC 64 of 2020), the Plaintiff's member deponed that the Plaintiff's members remain the legitimate owners of the land having occupied the land since it was allocated to them; that despite the orders of the court of 19th June, 2020 in Milimani CMCC No. 2196 of 2020, police officers chased their members out of the suit property and that the acts of the Defendant will cause the Plaintiff's members irreparable loss and prejudice.

51. In response to the Application by the Plaintiff in Machakos ELC 64 of 2020, the Defendant herein deponed that on 6th June, 2005, the Defendant purchased L.R No. 337/1002 measuring 20.47 Ha situated in Mlolongo area, Machakos County from Africa Floor (1969) Limited; that the Defendant sub-divided the suit property and developed a portion thereof by constructing 417 Bungalows which it sold to third parties; that the remaining portion of the suit land was sub-divided into two portions, to wit, L.R Nos. 337/5371 and 337/5372 and that the Defendant has been in possession of the said two portions of land.

52. It was the deposition of the Defendant's Director in Machakos ELC NO. 64 of 2020 that the Plaintiff (Kaseve Welfare Society) instituted a suit in the Chief Magistrate's Court being Milimani CMCC No. 2196 of 2020 restraining the Defendant from interfering with the Plaintiff's right to access and use the suit property and that the Plaintiff used the *ex parte* orders it obtained in the lower court to encroach onto the suit property.

53. The Defendant's Director deponed that on 7th August, 2020, the lower court struck out the Plaintiff's suit for want of pecuniary and territorial jurisdiction and that in any event, the Plaintiff does not have the *locus standi* to file the present suit.

54. The Defendant in ELC No. 64 of 2020 did not only respond to the Application for injunction but also filed its own Application dated 18th August, 2020 in which it sought for the following orders:

a. That this Honourable Court be pleased to direct the Plaintiff/Respondent to deposit security for costs as may be stipulated by this Honourable Court taking into account the substantial value of the suit properties and the fact that the Plaintiff has no known assets and/or offices within the jurisdiction of the court and moreover the Plaintiff is yet to settle the costs awarded to the Defendant in the Chief Magistrate's Court at Milimani, CMCC 2196 of 2020 and in default of furnishing such security, this suit stands dismissed.

b. That the costs of this Application be provided for.

55. After hearing the two Applications in Machakos ELC No. 64 of 2020, this court rendered its Ruling in the presence of the advocates for the parties on 2nd October, 2020. In the Ruling, the court dismissed the Plaintiff's Application for injunction and allowed the Defendant's Application for security for costs to the tune of Kshs. 1,000,000 to be deposited in court within 30 days of the date of the Ruling.

56. Indeed, in Machakos ELC No. 64 of 2020, the main issue was whether the Plaintiffs herein, and their members, were in possession of LR No. 337/1002 and its sub divisions, and if so, whether they were entitled to an order of injunction pending the hearing of the suit. In answering that question, this court held as follows:

"52. That being the case, and considering that the Plaintiff never accepted the purported offer by paying to the government the requisite amount of Kshs. 808, 750 within 30 days or at all, I find that the Plaintiff has not established a *prima facie* case with chances of success.

53. In any event, the suit property no longer exists, the same having been sub-divided by the Defendant, and some portions developed and sold to third parties. Indeed, if the Plaintiff's members were in occupation of the suit property as they claim, they should have seen the developments that were coming up on a portion of the suit property, and objected.

54. The fact that the Defendant put up several bungalows on a portion of L.R No. 337/1002 which it has since sold to third parties without any objection clearly shows that the Plaintiffs' members have never been in occupation of the suit property.

55. Considering that the Plaintiff has not proved by way of Affidavit evidence that its members are in occupation of the suit property, and having failed to establish a *prima facie* case with chances of success, I find that the Plaintiff is not entitled to an injunctive order."

57. In a nutshell, this court in Machakos ELC No. 64 of 2020 found that *prima facie*, the Plaintiff's members were not in possession of LR No. 337/1002 and its sub divisions; that LR No. 337/1002 ceased to exist and that the Defendant had put on a portion of the suit property houses which it sold to third parties without any objection from the Plaintiffs. It is on that basis that the Plaintiffs' Application for injunction was dismissed.

58. When the current suit was filed, the Plaintiffs did not mention to this court about the existence of Machakos ELC No. 64 of 2020 or the Ruling of this court in that matter. Indeed, due to the failure by the Plaintiffs to disclose to this court that the court and the Magistrate's court had actually dealt with this dispute before, the court was misled into issuing an *ex parte* injunction in favour of the Plaintiffs, which decision is in conflict with the decision that had been rendered by this court in Machakos ELC No. 64 of 2020.

59. The Plaintiffs having not disclosed in their pleadings about the existence of Machakos ELC No. 64 of 2020 and the Ruling of this court in that matter, the court granted to the Plaintiff *ex parte* injunctive orders which it would not have granted had those facts been disclosed. Consequently, and in addition to the fact that the Application was not served on the Defendant, the orders of injunction of this court dated 28th April, 2021 are hereby set aside.

60. The last issue that this court will consider is whether this suit should be struck out for being an abuse of the court process. Order 2 Rule 15 (1) (d) of the Civil Procedures Rules provides as follows:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) ...

(b) ...

(c) ...

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

61. The Court of Appeal discussed the issue of striking out pleadings in the case of ***Kivanga Estates Limited v National Bank of Kenya Limited [2017] eKLR*** as follows:

“Striking out a pleading, though draconian, the court will, in its discretion resort to it, where, for instance, the court is satisfied that the pleading has been brought in abuse of its process or where it is found to be scandalous, frivolous or vexatious. Where the court below has properly addressed itself on these principles, and is satisfied, upon assessment of the material before it that any of the grounds enumerated under order 2 rule 15 exists, as an appellate court, this Court will not interfere with the exercise of the former's discretionary power to strike out the pleading.”

62. In the same case, the Court of Appeal held as follows:

“In the result and with respect we agree with the conclusion of the learned Judge that although none of the previous suits were determined on merit, the fact that they were abandoned before determination and fresh ones brought was in itself an abuse of the process of the court sufficient under order 2 rule 15 (1) (b) and (d) to justify striking out.”

63. The Defendant's advocate submitted that this suit is a classical example of what abuse of the court process is; that there are two pending suits in this court between the same parties and in respect to the same suit property and that the court determined the Plaintiffs' Application for injunction in ELC. No. 64 of 2020.

64. The Plaintiffs in this matter sued the Defendant in the Chief Magistrate's Court in Milimani CMCC No. 2196 of 2020. In the said suit, the Plaintiffs sought for both temporary and permanent orders of injunction in respect of the suit property. The Plaintiffs obtained a temporary order of injunction in that suit on 10th July, 2020.

65. When the Defendant was served with the order, it filed an Application to have the suit in the lower court to be struck out. The said suit was struck out by the learned Magistrate for want of both territorial and pecuniary jurisdictions.

66. The Plaintiffs then moved this court vide Machakos ELC No. 64 of 2020 on 13th August, 2020 seeking for injunctive orders in respect to the suit property. After hearing the Plaintiff's Application for injunctive orders, this court on 2nd October, 2020 dismissed the said Application and directed the Plaintiffs to deposit Kshs. 1,000,000 in this court as security.

67. However, before withdrawing the said suit, or depositing the said Kshs. 1,000,000 as directed by the court, the Plaintiff filed this suit on 13th April, 2021 in respect to the same suit property and obtained a temporary orders of injunction.

68. The issues that the Plaintiffs raised in Machakos ELC No. 64 of 2020 have already been discussed in the preceding paragraphs. Indeed, when the Plaintiff in Machakos ELC No. 64 of 2020 is read together with the Originating Summons in this matter, it follows that the issues in the two matters are one and the same, and so are the parties.

69. As correctly submitted by the Defendant's counsel, the Plaintiffs are litigating in instalments. If the Plaintiff's wanted to canvass the

issue of having acquired the suit property by way of adverse possession, they should have canvassed that issue in ELC. No. 64 of 2020. Indeed, the Court of Appeal has stated in numerous decisions that one need not file an Originating Summons to be entitled to an order of adverse of possession. In the case of *Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR*, the Court of Appeal held as follows:

*“The courts, have since this decision, held that a claim by adverse possession can be brought by a plaintiff. See **Mariba v Mariba Civil Appeal No. 188 of 2002**, counter-claim or defence as was the case here. See **Wabala v Okumu (1997) LLR 609 (CAK)**. In **Gulam Mariam Noordin v Julius Charo Karisa, Civil Appeal No 26 of 2015**, where the claim was raised in the defence, this Court in rejecting the objection to the procedure, stated the law as follows;*

‘... Be that as it may, and to answer the question, whether it was

*erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of **Wabala v Okumu [1997] LLR 609 (CAK)**, which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in **Bayete Co. Ltd v Kosgey [1998] LLR 813** where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.”*

70. The Plaintiffs’ Plaintiff in ELC No. 64 of 2020 was principally based on their contention that they have been on the suit property for a long period continuously, and that they were in possession of a letter of allotment for the said land. That being the case, nothing would have been easier than amending the said Plaintiff to make a plea for adverse possession, or to withdraw the suit before filing the current suit.

71. Indeed, it seems that the Plaintiffs were aware all along that the issues raised in this suit and ELC No. 64 of 2020 are the same. The Plaintiffs also seem to have been aware that the current suit could only be sustained after the first suit has been withdrawn. I say so because after the Defendant objected to the filing of the current suit, the Plaintiffs filed a Notice of Withdrawal of Machakos ELC 64 of 2020 on 24th May, 2021 way after filing the current suit and obtaining *ex parte* orders of injunction.

72. The Notice of Withdrawal filed on 24th May, 2021 was filed on the same day the Plaintiffs filed the Replying Affidavit to the current Application, which Notice has not been adopted by this court to date. To that extend, ELC 64 of 2020 is still subsisting.

73. The filing of this suit by the Plaintiffs without disclosing that Machakos ELC No. 64 of 2020 between the same parties and over the same subject matter was pending in this court, and in the process obtaining injunctive orders which were in conflict with the orders that had been issued in ELC No. 64 of 2020, is a classic case of abuse of court process.

74. This court cannot allow the Plaintiffs to litigate in instalments, and in the process cause confusion in the nature of the orders that ensure from the court due to multiplicity of suits and material non-disclosure by the Plaintiffs. In the circumstances, this court is in agreement with the Defendant’s submissions that this suit should be struck out with costs for being an abuse of the court process.

75. For those reasons, the Defendant’s Application dated 30th April, 2021 is allowed as follows:

a) The orders of this court granted on 28th April, 2021 and the subsequent orders of status quo are hereby discharged and set aside.

b) The Plaintiffs’ suit is struck out with costs for being an abuse of the court process.

c) The Plaintiffs to pay the costs of this Application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 18TH DAY OF JUNE, 2021.

O. A. ANGOTE

JUDGE