REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO E018 OF 2021 (O.S.)

GEORGE WAWERU & 205 OTHERS.....APPLICANTS

VERSUS

BAMBURI CEMENT LIMITED.....RESPONDENT

RULING

1. This Ruling is in respect to two Applications. The first Application dated 28th April, 2021 was filed by the Applicants in which they have sought for the following orders:

> **a) That a temporary injunction be issued restraining the Defendant herein 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 title IR No. 199340, LR No. 14750/36 located in Athi River Sub-County in Machakos County pending the hearing and determination of the suit.**
>
> **b) That the cost of this application be provided for.**

2. The second Application dated 17th June, 2021 was filed by the Defendant in which it sought for the following orders:

> **a) That the ex parte proceedings of 3rd June 2021 and all consequential orders be set aside pending the hearing and determination of the suit by the Respondents (sic).**
>
> **b) That costs of the application be provided for.**

3. The Applicant's application is supported by the Affidavit of the 1st Applicant who has deponed that the Respondent is the registered proprietor of land known as **Title number 199340, LR No. 14750/36** (the suit property) and that the Applicants who are approximately 280 in number occupy in equal share the suit property.

4. According to the 1st Applicant, the Applicants' occupation of the suit property has been without authorisation by the Respondent; that their occupation of the suit property has been in excess of 20 years and has continued uninterrupted and that they have occupied the entire land by constructing houses thereon.

5. The 1st Applicant deponed that their rights of ownership have crystallized; that their occupation, use and enjoyment of the suit property uninterrupted for such a long period of time has extinguished the Respondent's title and that they should be declared the legitimate owners of the suit property.

6. According to the Applicants, their protests against the Respondent's claim for the suit land has been met with threats and intimidation so as to allow the Respondent to conclude its illegal takeover of the suit property; that the Respondent's actions are restricting their movement in and out of the suit property and that the Application should be allowed.

7. In response to the Application for injunction, the Respondent's Head of Legal and Compliance Department deponed that the Respondent is a cement manufacturing company with one of its key plants situated in Mavoko, Athi River, Machakos County and that the Respondent is the registered proprietor of the suit property measuring approximately 42.35 hectares having purchased it in September 2007 from Capitile International Limited.

8. It was deponed by the Respondent's Head of Legal and Compliance Department that the suit property was specifically purchased for

purposes of undertaking mining activities because of its strategic location, the presence of adequate pozzolana in the area as well as its proximity to the Nairobi-Mombasa Highway and that a lot of research and due diligence was carried out before purchase of the suit property to ascertain its pozzolana reserves.

9. It was deponed that when the suit property was purchased, in 2007, proper due diligence was undertaken that established that it was free from any encumbrances and uninhabited; that the property was previously registered as agricultural land and it was therefore necessary to effect change of user in order to undertake the mining activities and that sometime in 2014, the Respondent applied for change of user to allow it to commence the mining process.

10. According to the Respondent's Head of Legal and Compliance Department, part of the application process for change of user included submitting a report from a physical planner confirming that the property was undeveloped and conducive for undertaking mining activities; that the photographs taken at the time not only show that the property was undeveloped, but that it was unoccupied and that the Respondent was required to surrender the title of the suit property to facilitate the issuance of a new title to reflect the change of use. It was deponed that this process was completed in 2018, and the Respondent was issued with a new title document.

11. According to the Respondent's representative, the Respondent began mining the lower part of the property, as this is done in phases, and reserved the upper part for later mining; that at that time, there were no people on the land and there were no structures, permanent or semi-permanent on the property and that it is not correct for the Applicants to allege that they have occupied the property for more than 20 years as the physical inspections undertaken and the images taken would have shown this.

12. It was deponed that this is a prime property for the Respondent; that it is constantly guarded by security company officials to ensure that the mining equipment, its staff and the land are adequately protected from vandals and that it is while on patrol in May 2020, that the Respondent's Country Security Manager was informed by the G4S Contract Manager that some unidentified persons were on the suit property and had set up semi-permanent dwelling structures on the upper part of the property.

13. The Respondent's Head of Legal and Compliance Department deponed that the Respondent was also informed that the said trespassers were in the process of illegally and informally subdividing the property into plots by placing what they termed as "beacons"; that the Respondent filed a report of the trespass at the Athi River Police Station which was recorded as OB/No 34/30/05/2020 at 1300hrs and that a copy of the Title Deed was provided to the police officers to aid them in their investigation into the identities of the trespassers.

14. It was deponed that following their investigations, the Police on 6th June 2020, accompanied with representatives from the Respondent, visited the suit property and uprooted approximately 100 "beacons"; that on that day, nine unidentified people were arrested, as trespassers, but were released by the police shortly thereafter and that on 9 June 2020, the unidentified trespassers returned to replace the structures and "beacons" that were removed on 6th June 2020.

15. It was deponed by the Respondent's Head of Legal and Compliance Department that although the Respondent was intent on initiating action to safeguard its property, it did not know the identity of those occupying the property and committing trespass; that it is with this background that the Respondent, on 27th May 2021 received the instant Application filed by the Applicants seeking injunctive orders, among others, against the Respondent and that the Application did not bear any hearing date nor was it accompanied by a hearing notice or an order from the court.

16. The Respondent's Head of Legal and Compliance Department deponed that the Respondent was surprised to learn that a court order had been issued on 3rd June 2021 with respect to the Application because it had not been notified of the hearing date and that the Respondent was not accorded an opportunity to be heard on the Application.

17. It was deponed that these proceedings violate the Respondent's right to property; that the orders issued by this court are prejudicial to the Respondent as its core business is cement manufacture and that by stopping its operations on the suit property, which have continued throughout the Applicants' illegal occupation, has and will continue to occasion it great financial and reputational losses. It was deponed that the Respondent has contracts to fulfil as well as orders for cement that must be satisfied, and this will be negatively impacted if the operations are stopped and access to its property hampered by an order of this court.

18. The Respondent's Head of Legal and Compliance Department deponed that the trespassers are presently fraudulently and illegally holding themselves out as owners of the suit property, subdividing and disposing off the suit property; that the Applicant cannot convey any title to third parties as the Respondent is the legitimate and demonstrated owner of the suit property; that a visit to the suit property by this court will clearly show that the photographs annexed to the Application are a false misrepresentation of the current state of the suit property and that any structures on the suit property must have been recently put up.

19. The Respondent's Head of Legal and Compliance Department deponed that it is imperative that the injunctive order is discharged as the Applicants are incapable of compensating the Respondent the reputational and commercial harm that it has and will suffer if the injunction remains in place; that the Applicants have not demonstrated that they have a *prima facie* case likely to succeed against the Respondent, and that the balance of convenience lies in favor of the Respondent, who is the registered proprietor of the suit property and who has been in possession of the same since 2007 when it was purchased.

20. It was deponed that in the event this court is minded to allow the continuance of the injunctive order, this court should compel the Applicants to give an undertaking to pay the sum of Ksh. 3,000,000 per month being the projected losses that are likely to be incurred by the Respondent from the stopped mining activities, until the determination of the Application.

21. The 1st Applicant filed a Supplementary Affidavit in which he deponed that there is another claimant to the suit property known as Munyeti Farm; that the Respondent's acquisition of the suit property is shrouded in mystery; that the alleged change of user was never effected and that the Applicants are not trespassers on the suit land.

22. The 1st Applicant deponed that the Respondent was duly served with a hearing notice through their corporate email number corp.lafargeholcim.com and that their right to the suit property by way of adverse possession has crystallized.

Submissions

23. The parties' advocates appeared before me and made oral submissions. In respect to the Respondent's Application dated 17th June, 2021, the Respondent's advocate submitted that although the Respondent was served with the Application dated 28th April, 2021, the Application did not have a hearing date and that the Respondent was not served with a hearing date as alleged by the Applicants.

24. Counsel submitted that having served the Respondent with the Application physically, they should have served the Respondent with the hearing notice physically and not by email as alleged; that Order 5 Rule 22B of the Civil Procedure Rules requires that a delivery receipt of the email be availed and that the Applicants have not complied with that provision.

25. The Applicants' advocate submitted that he has availed evidence to show that the Respondent was served with the hearing notice by way of an email; that the orders of this court were validly issued and that the Respondent deliberately failed to attend court.

26. In respect to the Application dated 28th April, 2021, the Applicants' counsel submitted that the Applicants have been in possession of the suit property for more than 12 years without the permission of the registered owner of the suit property; that the Applicants have put up homes on the suit property and that the order for injunction should be issued. According to the Applicants' counsel, the Applicants will suffer irreparable injury that cannot be compensated in damages unless the injunctive orders are issued.

27. In response, the Respondent's counsel submitted that the Physical Planner's Report of the year 2017 shows that the Applicants were not on the suit property then; that the Applicants invaded the suit property in May, 2020 and that the Applicants have been damaging the machinery that is on the suit property.

Analysis and findings

28. The record shows that this suit was commenced by way of an Originating Summons on 3rd May, 2021. Accompanying the Originating Summons was the Notice of Motion dated 28th April, 2021 filed under a certificate of urgency in which the Applicants sought for injunctive orders. When the Application was placed before this court on 5th May, 2021 ex parte, the court declined to certify the Application as urgent and directed that the same be fixed for hearing in the registry.

29. An *ex parte* date for 3rd June, 2021 was taken in the registry by the Applicants' advocate. When the Application came up for hearing on 3rd June, 2021, the Applicants' advocate informed the court that he had served on the Respondent the Application. The court proceeded to allow the Application for injunction as unopposed.

30. The Respondent has stated that although it was served with the Application dated 28th April, 2021, they were not served with a hearing notice and that they were not aware of the hearing date of 3rd June, 2021. On that ground alone, the Respondent wants this court to set aside the orders of 3rd June, 2021.

31. The Applicants' advocate has admitted that indeed, the Application that was served on the Respondent physically did not indicate the date that the same was coming up for hearing and that a hearing notice was served on the Respondent via an email. The Respondent has denied having been served with a hearing notice vide an email as alleged.

32. The Affidavit of Service that was filed in this court on 2nd June, 2021, and which this court relied on to grant the orders of injunction did not indicate that the Applicants did serve the Respondent with a hearing notice by way of an email. Indeed, the reading of the Affidavit of service shows that the Application was served on the Respondent physically on 27th May, 2021. The assumption that the court made while allowing the Application was that the Application indicated the date when the same was coming up for hearing.

33. In the Replying Affidavit, the 1st Applicant has deponed that their advocate served the Respondent with a hearing notice vide an email. An extract of an email from kalwaadvocates20@gmail.com to corp.info@lafargeholcim.com has been exhibited by the Respondent. The email shows that the same was send purportedly to the Respondent on 29th May, 2021 at 3;02 PM. That email does not state in categorical terms that the Application was coming up for hearing on 3rd June, 2021, neither has the copy of the hearing notice that was purportedly attached on the email exhibited.

34. Order 5 Rule 22B of the Civil Procedure Rules provides as follows:

> ***"Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.***
>
> ***Service shall be deemed to have been effected when the Sender receives a delivery receipt."***

35. The Applicants have not shown how they identified the email corp.info@lafargeholcim.com as that belonging to the Respondent and that the said email was the one to be used for serving of process. The Applicants have also not exhibited a delivery receipt of the email that was supposedly sent to the Respondent on 29th May, 2021.

36. Having not indicated in the Affidavit of Service that they served the Respondent with a hearing notice by email and not physically, and in the absence of evidence to show that indeed a hearing notice was served on the Respondent vide a confirmed and used email, it is my finding that the allegation that a hearing notice was served on the Respondent by way of an email is not only an afterthought, but also false. That being the case, I allow the Respondent's Application dated 17th June, 2021.

37. I will now turn to the Application dated 28th April, 2021 in which the Applicants are seeking for temporary injunctive orders. The test for granting of an interlocutory injunction was considered in the **American Cyanamid Co. vs Ethicon Limited (1975) AC 396** case in which the court provided that for an injunction to issue, the Applicant must satisfy three elements, namely:

i) There must be a serious issue to be tried;

ii) Damages are not an adequate remedy;

iii) The balance of convenience lies in favour of granting or refusing the application.

38. These are the same grounds that had been postulated earlier on in the case of ***Giella vs Cassman Brown (1973) EA 358*** as follows: The Applicant has to show a *prima facie* case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by an award of damages, and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience.

39. What amounts to a *prima facie* case was explained in ***Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR* 125** as follows:

"So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

40. In ***Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR,*** the Court of Appeal analyzed the grounds upon which the court can grant temporary orders of injunction as follows:

"…These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See* Kenya Commercial Finance Co. Ltd V. Afraha Education Society *[2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

41. In the same case, the Court of Appeal stated that the party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained; the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.

42. In considering whether or not a *prima facie* case has been established, the court is not required to hold a mini trial and must not examine the merits of the case closely. All that the court has to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation *(See* ***the Nguruman case****).*

43. The Applicants' case is that that the Respondent is the registered proprietor of land known as Title number 199340, LR No. 14750/36 (the suit property); that they are approximately 280 in number in occupation in equal share of the suit property and that their occupation of the suit property has been without authorisation by the Respondent; that their occupation of the suit property has been in excess of 20 years uninterrupted and that they have occupied the entire land by constructing houses thereon.

44. According to the Applicants, their rights of ownership over the suit property have crystallized; that their occupation, use and enjoyment of the suit property uninterrupted for such a long period of time has extinguished the Respondent's title and that they should be declared the legitimate owners of the suit property. In a nutshell, the Applicants are seeking to be declared the owners of the suit property by way of adverse possession.

45. Section 7 and 38(1) of the **Limitation of Actions Act** states as follows:

"7. 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.

38(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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."

46. The courts have put the above provisions of the law and the doctrine of adverse possession into context. In the case of ***Kimani Ruchine vs. Swift Rutherford & Co. Ltd [1980] KLR,*** the court held as follows:

> ***"The Plaintiffs have to prove that they have used this land which they claim, as of right: nec vi, nec clam, nec precario…The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it or by any recurrent consideration".***

47. In ***Teresa Wachuka Gachira vs. Joseph Mwangi Gachira (2009) eKLR,*** the Court of Appeal held as follows:

> ***"There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing or cultivation depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor."***

48. In ***Benjamin Kamau Murima & Others vs. Gladys Njeri, Civil Appeal No. 213 of 1996,*** the Court of Appeal held as follows:

> ***"The combined effect of the relevant provisions of Sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possession of that land."***

49. The Supreme Court of India, in ***Karnataka Board of Wakf vs. Government of India & Others (2004) 10 SCC 779***, stated as follows:

> ***"In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well- settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period."***

50. Having put the law relating to adverse possession in perspective, the issue that arises is whether, *prima facie*, the Applicants have been in possession of the suit property for 12 years and whether the said possession has been adequate in continuity, in publicity and in extent to show that their possession is adverse to the Respondent.

51. It is not in dispute that the Respondent was registered as the proprietor of LR No. 14750/4 measuring 40 HA (the suit property) on 3rd August, 2007, having bought it from Capitalite International Limited. It is the Respondent's case that the suit property was specifically purchased for purposes of undertaking mining activities because of its strategic location, the presence of adequate pozzolana in the area as well as its proximity to the Nairobi-Mombasa Highway and that a lot of research and due diligence was carried out before purchase of the suit property to ascertain its pozzolana reserves.

52. The Respondent has informed the court that when the suit property was purchased, in 2007, proper due diligence was undertaken that established that it was free from any encumbrances and uninhabited; that the property was previously registered as agricultural land and it was therefore necessary to effect change of user in order to undertake the mining activities and that sometime in 2014, the Respondent applied for change of user to allow it to commence the mining process.

53. The Respondent has annexed the application for the change of user of the suit property from "Agricultural to Quarry (Pozzolana)" which was approved by several institutions including the County Physical Planning Office, Machakos. The said change of user of the suit property was eventually approved by the County Government of Machakos on 21st April, 2015.

54. According to the Respondent's Head of Legal and Compliance Department, part of the application process for change of user included submitting a report from a physical planner confirming that the property was undeveloped and conducive for undertaking mining activities; that the photographs taken at the time not only show that the property was undeveloped, but that it was unoccupied and that the Respondent was required to surrender the title of the suit property to facilitate the issuance of a new title to reflect the change of use. It was deponed that this process was completed in 2018, and the Respondent was issued with a new title document.

55. According to the Respondent's representative, the Respondent began mining the lower part of the property, as this is done in phases, and reserved the upper part for later mining; that at that time, there were no people on the land and there were no structures, permanent or semi-permanent on the property and that it is not correct for the Applicants to allege that they have occupied the property for more than 20 years as the physical inspections undertaken and the images taken would have shown this.

56. It was deponed that this is a prime property for the Respondent; that it is constantly guarded by security company officials to ensure that the mining equipment, its staff and the land are adequately protected from vandals and that it is while on patrol in May 2020, that the Respondent's Country Security Manager was informed by the G4S Contract Manager that some unidentified persons were on the suit property and had set up semi-permanent dwelling structures on the upper part of the property.

57. The general principle in claims of adverse possession is that until the contrary is proved, possession in law follows the right to possess: ***Kynoch Ltd vs Rowlands [1912] 1 Ch 527, 534***. Lindley MR in ***Littledale vs Liverpool College*** **[1900] 1 Ch 19, 21** put it in these words:

"In order to acquire by the statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it ..."

58. The same point was made by Bramwell LJ in ***Leigh v Jack (1879) 5 Ex D 264, 272,*** where he said, referring to the statute of limitations:

'Two things appear to be contemplated by that enactment, dispossession and discontinuance of possession.' If this is the right way to approach the problem, the question becomes 'Has the claimant proved that the title holder has been dispossessed, or has discontinued his possession of the land in question for the statutory period?' rather than 'Has the claimant proved that he (through himself or others on whose possession he can rely) been in possession for the requisite number of years?' It certainly makes it easier to understand the authorities if one adopts the first formulation."

59. On the question of what constitutes dispossession of the proprietor, **Bramwell LJ** in ***Leigh v Jack*** (supra) stated that to defeat a title by dispossessing the former owner, 'acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.'

60. The perusal of the application for approval for development that the Respondent made on 27th March, 2015 and approved by the County Government of Machakos has an accompanying report. The report which was submitted to the County Government of Machakos provides that the entire land was undeveloped as at March, 2015. The Report has photographs showing the unoccupied suit property.

61. The report which was in support of the application for approval for development shows that the views of the public were sought on the intended development of the suit property through a public notice in the Standard Daily Newspaper dated 17th March, 2015. The Respondent has annexed a copy of the published notice of the change of user of the suit property in the Standard Newspaper of 17th March, 2015.

62. The Applicants did not inform the court why they did not object to the change of user of the suit property from agricultural to Quarry (Pozzolana) if they were indeed on the suit property as at the time the notice was published in the newspaper of 17th March, 2015.

63. Although the Applicants have deponed that they have been on the suit property for 20 years, and that they have occupied the entire land measuring 42. 35HA (approximately 105 acres), they have not informed this court the circumstances under which they entered on the land 20 years ago, if at all, and the activities that they have been undertaking on the suit land.

64. The blanket deposition by the Applicants that they have been on the land for 20 years, without stating when and how they entered the land, and how or when they dispossessed the Respondent the suit property, and whether the use they put the suit property is adverse to the Respondent's use, cannot, *prima facie*, suffice for a claim of adverse possession.

65. Furthermore, the copies of the photographs annexed on the 1st Applicant's Supporting Affidavit do not show the date or year that the said photographs were taken, neither do they show the person who took them. In my view, for the Applicants to succeed in their claim, the person who took the photographs should have sworn an Affidavit stating the date that he took the said photographs and an averment that indeed the depicted structures are on the suit property, and not on any other land.

66. The Applicants have not explained why they never objected to the change of user of the suit property from agricultural to Quarry (Pozzolana) in the year 2015, and the circumstances under which they entered the suit property 20 years ago, if at all. The Applicants also failed to annex dated photographs together with the Affidavit of the photographer. For those reasons, it is my finding that the Applicants have not established a *prima facie* case with chances of success.

67. Indeed, having not established, *prima facie*, that they are in occupation of the entire land measuring approximately 105 acres, it is my finding that the Applicants have not demonstrated that they will suffer irreparable injury that cannot be compensated by way of damages.

68. The Respondent purchased the suit property in the year 2007 and has been mining the suit land for Pozzolana in phases since then. The Respondent's machinery for mining has always been on the land and is in occupation of the suit land. That being case, the balance of convenience tilts in favour of the Respondent. It is the Respondent who is entitled to occupy and use the suit property pending the hearing of the suit.

69. For those reasons, I find the Applicants' Application dated 28th April, 2021 to be unmeritorious. In the circumstances, the court makes the following orders:

a) The Applicants' Application dated 28th April, 2021 is dismissed with costs.

b) The Respondent's Application dated 17th June, 2021 is allowed with costs.

c) The orders of this court of 3rd June, 2021 and the status quo orders of 27th July, 2021 are hereby set aside.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 29TH OCTOBER, 2021.

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for the Applicants

Ms Impano for the Respondent

Court Assistant – John Okumu