REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 37 OF 2018

DOMINIC KATUA NZIOKI.....1ST APPLICANT

ANASTASIO NJUE NJIRU.....2ND APPLICANT

SOLOMON KIMANI KAIRU *(Suing on their behalf and as the*

officials of Ngelani Pioneer Society).....**3RD APPLICANT**

VERSUS

ZIBA TRUSTEES LIMITED.....1ST RESPONDENT

NATIONAL MEDIA GROUP STAFF

RETIREMENT BENEFIT SCHEME.....2ND RESPONDENT

RULING

1. In the Application dated 1st March, 2018, the Plaintiffs are seeking for the following reliefs:

> ***a. That a temporary injunction be issued restraining the Respondents herein either by themselves, agents, employees, proxies and or servants from entering, evicting, sub-dividing, obtaining consent for transfer, selling, transferring, disposing, wasting, alienating and or dealing in any way with Land Title No. 81100/3 in Mavoko Settlement Scheme within Machakos County pending the hearing and determination of this suit.***
>
> ***b. That the cost of this Application be provided for.***

2. The Application is supported by the Affidavit of the 1stApplicant who has deponed that he has been authorized by his Co-Applicants to plead on their behalf in this matter; that in the year 2004, they moved and settled on parcel of land known as L.R. No. 81100/3 *(the suit land)*; that they constructed houses and other necessary facilities on the land and that they have been living on the suit land without the authority of the Respondents.

3. According to the Applicants, after settling on the suit land, they formed a Society that brought together all the persons who were living on the land; that they have been in occupation of the suit land for over twenty five (25) years and that they are the presumptive owners of the land.

4. The 1st Applicant finally deponed that early this year, the Respondents by themselves and agent's descendent on their homes and destroyed their properties with the intention of evicting them; that the intended eviction and demolition of their houses was illegal; that their rights of ownership of the suit property has crystallized against the Respondents herein and that they have acquired title to the suit land by adverse possession.

5. In his Replying Affidavit, the 2nd Respondent's Head of Legal and Training deponed that the 2nd Respondent is the registered proprietor of land reference No. 81100/3, Mavoko Municipality, Machakos County *(the suit property);* that the 2nd Respondent purchased the suit property from the 1st Respondent for Kshs. 440 million and that the 2nd Respondent has been enjoying uninterrupted vacant possession of the suit property since 2013 to date.

6. According to the 2nd Respondent's Head of Legal and Training, a valuer inspected the suit property and submitted a report on 26th September, 2012; that the valuer's report confirmed that the suit property was vacant and that the only improvements on the suit property were an abandoned farm building and a quarry.

7. According to the 2nd Respondent, a second valuation was done after the 2nd Respondent purchased the land; that the valuation report of 12th February, 2014 also confirmed that the suit property was vacant with scattered savannah vegetation and sisal plants and that this state of affairs was confirmed by a third valuation report dated 13th December, 2016.

8. It is the deposition of the 2nd Respondent's Head of Legal Services that on 5th February, 2018, the 2nd Respondent hired a security company to guard the suit property; that on 21st February, 2018, the 2nd Respondent published an advertisement in the Daily Nation Newspaper warning trespassers to keep of the suit property and that on 14th April, 2018, the 2nd Respondent instructed a photographer to take photos of the suit property.

9. The 2nd Respondent's Head of Legal Services finally deponed that the 2nd Respondent holds an indefeasible title to the suit property and is in possession of the same; that it is not true that the Applicants have been on the land since the year 2004 and that the Applicants have not demonstrated that they have a prima facie case with chances of success.

10. In his submissions, the Applicants' advocate submitted that the court had the benefit of hearing parties herein on the prevailing *status quo*; that since the court ordered for the maintenance of *status quo*, nothing has changed and that the Plaintiffs have been in continuous and uninterrupted occupation, use and enjoyment of the suit land for a period in excess of twelve (12) years.

11. Counsel submitted that the Applicants have constructed houses on the suit land and have been living a normal life until they started opening up roads on the suit land; that the Respondents removed the doors and windows to their homes in a bid to evict them and that the local Chief has confirmed that the Plaintiffs have been in occupation of the suit land.

12. The Applicants' counsel finally submitted that unless the Application for injunction is allowed, the Plaintiffs will become homeless and that being in possession of the land, the balance of convenience tilts in their favour.

13. The 2nd Respondent's advocate submitted that the 2nd Respondent is the registered proprietor of the suit land; that the Applicants' Application does not meet the threshold for the grant of an injunction and that the Applicants have not produced any evidence by way of photographs, or otherwise, showing the houses, schools, churches, roads or livestock on the suit property.

14. Having admitted that their houses were demolished by the Respondents, the 2nd Respondent's advocate submitted that the Applicants had admitted that there was no continuity of possession of the suit land by the Applicants and that the Deputy Registrar of this court captured the situation on the ground.

15. The 2nd Respondent's advocate submitted that if indeed 98 people were in occupation of the suit land as alleged by the Applicants, there would be evidence in the form of infrastructure and that the only probable explanation that can be arrived at is that the Applicants have never been in possession of the suit land as alleged. The Respondents' advocates relied on numerous authorities which I have considered.

Analysis and findings:

16. The Notice of Motion dated 1st March, 2018 which is the subject of this Ruling was filed alongside the Originating Summons of the same date. In the Originating Summons, the Applicants, who are the officials of Ngelani Pioneer Society, have sought for a declaration that they are entitled to be registered proprietors of various land sizes of land title No. 81100/3 in Mavoko, Machakos County, by way of adverse possession.

17. The Applicants' case, both in the Originating Summons and the Notice of Motion, is that they moved on the suit property in August, 2004; that they constructed houses and other facilities on the suit property without the consent of the Respondents and that it is now close to twenty five (25) years since they occupied the suit property.

18. According to the Applicants, they have exercised ownership rights over the suit property by: constructing both permanent and semi-permanent houses; building schools and churches; constructing roads; rearing livestock like cows, chicken, quails, goats; burying their deceased family members on the suit land; and doing everything that an owner of the land can do.

19. The Applicants have annexed on their Supporting Affidavit a list of members of Ngelani Pioneer Society. The said list has a total of 98 members. The Applicants have also annexed on their Affidavit a Certificate of Registration of Ngelani Pioneer Welfare Association. The said certificate shows the Association was registered as a Society on 21st February, 2018. A total of twelve (12) photographs have also been annexed on the Applicants' Supporting Affidavit.

20. The 2nd Respondent has opposed the Application. According to the 2nd Respondent, no one was occupying the suit property in 2012 when they purchased the land from the 1st Respondent. The 2nd Respondent has annexed three valuation reports to support its claim that the Applicants have never taken possession of the suit land, either in 2004, or at all.

21. In the current Application, the Applicants are seeking for an order of injunction restraining the Respondents from *"entering, evicting, sub-dividing, obtaining consent for transfer, selling, transferring, disposing, wasting, alienating and or dealing in any way with land title No. 81100/3 pending the hearing and determination of the suit."*

22. The law relating to the grant of an order of injunction was enunciated by the Court of Appeal in the case of ***Giella vs. Cassman Brown & Co. Ltd (1973) 1 EA 358*** as follows:

> ***"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."***

23. In the case of ***Kenya Commercial Finance Co. Limited vs. Afraha Education Society (2001) 1 E.A 86,*** the Court of Appeal held as follows:

> ***"The sequence of granting an interlocutory injunction is firstly that an Applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the Application on a balance of convenience. See Giella vs. Cassman Brown and Co. Ltd 1973 EA at page 360 Letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed."***

24. In the ***Nguruman Ltd vs. Jan Bonde Nielsen (2014) eKLR*** case, the Court of Appeal held that if a prima facie case is not established, then irreparable injury and balance of convenience need no consideration. In ***Mrao Ltd vs. First American Bank of Kenya Limited and 2 others (2003) KLR 125,*** the Court of Appeal defined a prima face case as follows:

> ***"a prima facie case in a Civil Application includes but is not confined to a genuine and arguable case. It is a case 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 later."***

25. The Applicants' case is primarily hinged on the doctrine of adverse possession which is captured under Section 38(1) of the Limitation of Actions Act. The said Section provides as follows:

> ***"Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land."***

26. Section 13(1) of the Limitation of Actions Act provides that a right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run, and where a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of that land.

27. The simple reading of Sections 13 and 38 of the Act means 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 twelve (12) years, the owner's entitlement to the land is extinguished, and the adverse possessor becomes the owner.

28. For one to prove that he is entitled to land by way of adverse possession, he has to prove that he has taken a sufficient degree of physical custody and control of the land in question and secondly, he has to show that he had the intention *(animus possidendi)* to exercise such custody and control of the land for his own benefit. These two elements must be proved by the claimant because the law always presumes that the title holder of land is in possession of his land.

29. Possession of land is a question of fact, hinging on all the circumstances, and especially the nature of the land and the manner in which it is usually enjoyed. It has been held that trivial acts by a squatter on a piece of land cannot be sufficient to proof factual possession. Exclusive and continuous control of the land is essential. In the case of ***J A Pye (Oxford) Ltd vs. Graham (2002) Ch. 676, the House of Lords*** held as follows:

> ***"If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude as best as he can, the court will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner."***

30. In the case of ***Mombasa Autocare Ltd vs. Japhet Pasi Kilonga & Anor (2014) eKLR,*** this court held as follows:

> ***"The seasonal and occasional cultivation of land by a squatter on the land in the absence of the true owner, in my view, cannot amount to dispossessing the true owner of his land or discontinuing his possession if such cultivation is not done on full scale, consistently and continuously with the express intention that the person cultivating the land intends to dispossess the true owner of his land. The intention must be manifested intentionally and unequivocally so that it is clear that the squatter is not just a persistent trespasser who disappears every time the true owner shows up."***

31. In the case of ***John O. Oyalo Wabala vs. Corne Lius Otataya Okume, Civil Appeal No. 208 of 1997,*** the Court of Appeal held that for one to be able to acquire a title to land registered in the name of another person, one has to be literally in occupation of the land, and the mere fact that crop is present on the land may not necessarily mean that the grower of such crops is asserting a claim of ownership to the land.

32. The 1st Applicant herein has deponed as follows:

> ***"2. THAT in 2004 August, we moved and settled on land parcel Title No. L.R. 81100/3 (annexed and marked DKN/2 is the list of members).***
>
> ***6. THAT it is now close to twenty five (25) years since we began occupation to the suit."***

33. Although the Applicants have deponed that they entered the suit land in the year 2004, meaning that they have been on the land for fifteen (15) years, they have contradicted themselves in the same Affidavit by stating that they have been in occupation for twenty five (25) years. Indeed, the Applicants have not stated in their Supporting Affidavit the circumstances that led them to move on the suit land, if at all, to enable the court ascertain the veracity of their claim.

34. Other than deponing that they moved on the suit land in the year 2004, the Applicants have not stated if they all moved on the land at the same time, or not. Indeed, considering that the Applicants are said to be 98 in total, it would be expected that the chronology of how each member, or family moved on the suit land with clarity.

35. The 2nd Respondent deponed that when it purchased the suit land in the year 2012, the said land was vacant, and that the only structures on the land were a few disused farm houses and a quarry. With this assertion by the 2nd Respondent, I expected each of the 98 Applicants to exhibit a photograph of his or her house situated on the suit land. However, none of the Applicants specifically pleaded that the few houses standing on the suit land was theirs. Instead, a general deposition that they were occupying the suit land was made by the 1st Applicant.

36. Considering that the 98 Applicants who have claimed that they have been in occupation of the suit land did not individually or as a family produce photographs showing their respective houses; and in the absence of an explanation of the circumstances that led them to occupy the suit land, if at all, I find and hold that the Applicants have not established a prima facie case with chances of success.

37. Indeed, the Applicants did not indicate the portion of the suit land that each one of them is occupying. Considering that the entire suit land measures approximately 101.2 acres, it was incumbent on the Applicants to state with clarity how and where each one of them occupies the said land. A general statement that they occupy the suit land without any further evidence on their actual location of occupation of the land cannot stand.

38. As was held in the ***Mrao case*** *(supra)*, a prima facie is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of right, and the probability of success of the Applicants' case upon trial. The Applicants have not demonstrated that in this matter.

39. For those reasons, I dismiss the Application dated 1st March, 2018 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE