Akute v Pop & 8 others (Enviromental and Land Originating Summons E006 of 2025) [2025] KEELC 5327 (KLR) (16 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5327 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E006 OF 2025

CK NZILI, J

JULY 16, 2025

IN THE MATTER OF AN APPLICATION FOR ORDERS UNDER SS. 37 & 38 OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

IN THE MATTER OF THE PARCEL OF LAND KNOWN AS L.R NO. 8954/2 (IR. NO. 49515)

BETWEEN

SAMSON TEELA AKUTE ..... PLAINTIFF

AND

DANEIL SIMIYU POP ..... 1ST DEFENDANT

BEN WANJALA MATUMBETI ..... 2ND DEFENDANT

NANCY JOHN MUTULA ..... 3RD DEFENDANT

EUNICE NAKHUMICHA WANJALA ..... 4TH DEFENDANT

GRACE NALIAKA JOHN ..... 5TH DEFENDANT

CATHERINE NASAMBU MAKOHKHA ..... 6TH DEFENDANT

GAMA ENTERPRISES LIMITED ..... 7TH DEFENDANT

THE CHIEF LAND REGISTRAR TRANS NZOIA COUNTY .. 8TH DEFENDANT

THE DIRECTOR, LAND ADJUDICATION & SETTLEMENT OFFICER ..... 9TH DEFENDANT

RULING

1. A party seeking orders of a temporary injunction has to establish a *prima facie* case with a probability of success at the hearing. Secondly, he has to show that he will suffer irreparable loss and damage in the

absence of an injunction. Thirdly, a party must show that the balance of convenience tilts in favour of granting the orders sought.

2. A *prima facie* case refers to an arguable case. In *Mrao Ltd v First American Bank Ltd* [2003] eKLR, a *prima facie* case was defined as established by looking at the material before a tribunal, which will conclude that a right has been infringed to call for rebuttal from the opposite party. Order 40 (1) of the *Civil Procedure Rules* provides that a court may grant a temporary injunction, if the property in dispute is in danger of being wasted, damaged or alienated by any party to the suit, or the defendant threatens or intends to remove or dispose of the property in circumstances affording a reasonable probability that the plaintiff, would be obstructed or delayed in executing any decree that may be passed by the court in his four.

3. Irreparable loss or damage refers to one that cannot be adequately quantified in monetary terms. In *Nguruman Ltd v Jan Bonde Nielsen & Others* [2024] eKLR, the court said that the loss or damage must be real, imminent and apparent; speculative fear or apprehension may not suffice.

4. Balance of convenience is defined as what the applicant will suffer if no injunction is granted, compared to what the respondent will suffer if the suit succeeds ultimately in his favour. See *Kenya Commercial Finance Co. Ltd v Afraha Education Society* [2001] Vol 1 EA 86. The three hurdles must be established distinctly, sequentially and logically, without any leap-frogging.

5. In reaching a determination that a temporary injunction should be granted, the court does not hold a mini-trial or make a definitive finding on fact or law, but sees that, based on the rival affidavits, there is a case established to be considered at the hearing. See *Airland Tours & Travel Limited v National Industrial Credit Bank* Nairobi (Milimani HCCC 1234 of 2002.

6. Has the applicant in the application dated 5/5/2025 surmounted the three hurdles? The grounds are set out on the face of the application and in a supporting affidavit of Samuel Teela Akute, sworn on 5/5/2025. He deposes that the suit land is registered in the name of the 7th respondent, as per a certificate of title issued on 4/5/1990, attached as STA-1, on the land he has occupied for 30 years. The deponent avers that, a demand letter dated 20/4/2025, was issued to vacate the land where he has constructed a house. He has attached the demand letter and photos as annexures STA-2 and 3.

7. The deponent deposes that the said land has been invaded, raided and trespassed on, despite efforts to restrain by local government agencies.

8. The deponent states that the 1st - 6th respondents are the ones who have illegally, irregularly and unlawfully procured resultant titles in 1998, attached as STA-4. The applicant deposes that the suit parcel had a charge with the Settlement Fund Trustees, to which he assisted in the payment of the loan. He attached the charge and the demand for loan as annexures STA-5 and 6. The applicant deposes that he is entitled to the land on account of adverse possession.

9. Both the originating summons and this application are opposed through an affidavit in reply of Stephen Maina Ngugi, sworn on 11/6/2025, on behalf of the 8th and 9th respondents. It is deposed that the suit parcel is currently re-allocated to the 1st - 6th respondents, after the it reverted back to the government from the 7th respondent, due to the failure to pay the Settlement Fund Trustees' loan by 1/7/1973.

10. The 8th and 9th respondents depose that the agreement between the applicant and the 7th respondent to salvage the offer in June 1995, came too late to replace the dishonoured cheques amounting to Kshs. 2,912,858/=, following which, between 1995 and 2003, several letters were sent to the 7th respondent as per annexure SN-5. It is deposed that efforts to auction the suit parcel in April 2002 was averted

by a proposal letter of the 7th respondent, through A.H. Malik Advocate annexed as SN-6 which unfortunately was not honoured, leading to Civil Suit No. 361 of 2004, where the 7th respondent tried to stop the auction, as per annexed pleadings and a dismissal order annexed as SN-7.

11. The 8th and 9th respondents depose that eventually, the 7th respondent had in 1991, sold its shares to Settlement Fund Trustees at Kshs. 24,000,000/= as per annexure SN-8 and eventually, the land reverted to the Land Settlement Scheme, formerly Settlement Fund Trustees, to which a second phase of vetting was conducted, and the 1st - 6th respondents became beneficiaries as per annexure SN-9. Given the foregoing, the 8th and 9th respondents depose that as from 1991, the land reverted to the government, hence cannot be subject to adverse possession under Section 41 of *Limitation of Actions Act*.

12. The primary claim by the applicant is captured in the originating summons dated 5/5/2025. The court is asked to determine whether the possession and the utilization of the suit parcel by the applicant for 30 years, has extinguished the rights of title held by the 1st - 6th respondents under adverse possession.

13. In the supporting affidavit to the originating summons, the plaintiff states that the land was registered in the name of the 7th defendant on 4/5/1990, as land parcel No. 8954/2 IR No. 49515. The applicant does not say how much out of the 323.3 Ha he has been possessing since 10/10/1994.

14. From the rival annexures by the 8th and 9th respondents attached to the replying affidavit, new information that the applicant had not disclosed at the ex-parte stage has resurfaced. The applicant has not filed a supplementary affidavit to refute those assertions. Learned counsel Mr. Katama Ngeywa urges the court to find that the applicant has not met the ingredients of a temporary injunction, for there is no proof of possession and development on the suit parcel. Further, learned counsel submitted that the annexure to the reply shows that the 1st - 6th respondents have title deeds to the suit parcel and therefore, to grant the relief sought would infringe on their proprietary rights.

15. Learned counsel Mr. Kigen for the applicant urges the court to find the application merited due to the possession by the applicant since 1994, as per photos attached to the application showing growing crops.

16. A *prima facie* is more than an arguable case. It has to be a genuine and arguable case. It is not sufficient to raise issues. The evidence must show that there is an infringement of a right and a probability of success of the applicant's case upon trial. The question of when the time for adversity began to run and whether the suit parcel was government or private land, with effect from 1994 to be subject to adversity, has not been addressed by the applicant. An overriding interest based on adverse possession by dint of Section 41 of the *Limitation of Actions Act* cannot issue on public, trust land, or land owned by the government. See *Ravji Karsan Sanghani v Peter Gakunu* [2019] eKLR

17. An applicant has to comply with Order 37 of the *Civil Procedure Rules*, by attaching a copy of the title register or extract. The applicant has not attached any evidence to discount the assertion that time could run after 1991. Since the 8th and 9th respondent have tendered evidence that the 7th respondent ceded the land to Settlement Fund Trustees in 1991 and upon default, the land was subsequently allocated to the 1st - 6th respondents. I find no *prima facie* case established. Once a *prima facie* case is not established, then irreparable injury and the balance of convenience need not be considered, otherwise the existence of *prima facie* case does not permit, leap-frogging, to the next two hurdles as held in *Kenya Commercial Finance Co. Ltd v Afraha Education Society* [2001] 1 EA 86.

18. The upshot is that I find the application dated 5/5/2025 lacking merits. The application is dismissed. Orders of status quo issued on 16/6/2025 are hereby vacated. Parties to comply with Order 11 of the *Civil Procedure Rules*.

19. Orders accordingly.

RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 16TH DAY OF JULY 2025.

In the presence of:-

Court Assistant - Dennis

Kigen for applicant present

Katama for Kithi for 1st - 6th defendants present

Kamu for 8th and 9th defendants present

Defendants present

7th defendant absent

HON. C.K. NZILI

JUDGE, ELC KITALE.