



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO.186 OF 2017 (O.S)**

**GREGORY MUTHEKE NDETI.....PLAINTIFF**

**VERSUS**

**GATEKEEPER LIMITED.....DEFENDANT**

**RULING**

1. In the Notice of Motion dated 24<sup>th</sup> April, 2017, the Plaintiff is seeking for the following orders:

***a. That the Honourable Court be pleased to grant an injunction restraining the Defendant either by itself, its agents or servants or any person acting on its behalf from trespassing, constructing, demolishing or in whatever manner whatsoever interfering with the Plaintiff's peaceful occupation and possession of all that property identified as Land Reference Number 377/4773 (formerly known as Drainage Area No. 3AA. Grid Ref. 745405, Map No. 148/4 General Map) until inter-partes hearing of the case.***

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

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that in 1979, he applied to the Ministry of Water Development for diversion of water to a portion of land measuring 1.21Ha also known as "Drainage Area No. 3AA Grid Ref. 745405, Map No. 148/4 General Map," which is within Athi River to use for purposes of irrigation.

3. It is the Plaintiff's deposition that the Water Apportionment Board issued him with file number 118857; that on 28<sup>th</sup> September, 1979, the Board approved his application; that he continued to be in occupation of the land, and that the existing diversion of water was approved on 2<sup>nd</sup> August, 1985.

4. It is the Plaintiff's case that even before he applied for the diversion of the water permit in 1979, his parents were still in occupation of the suit land and that he is still in occupation of the land to date.

5. The Plaintiff finally deponed that he gave a portion of the suit land to a nursery school and that recently, the Defendant's director started claiming that the land was his. According to the Plaintiff, having been on the land since 1979, he is entitled to it by virtue of operation of the law.

6. In reply, the Defendant's Director deponed that the documents annexed on the Plaintiff's Supporting Affidavit are in the name of Gregory Leges Mutheke and not the Plaintiff; that the land the Plaintiff is claiming was not registered at the time he purported to use it and that the Plaintiff was not given permission to construct a residential house on the land.

7. It is the Defendant's case that it purchased the suit on 23<sup>rd</sup> March, 2011 and that one cannot claim for adverse possession against the government.

8. According to the Defendant's director, when he purchased the suit land, there was a temporary house on a portion of the land which he was assured that it will be removed.

9. Both the Plaintiff and the Defendant's advocates filed detailed submissions, which I have considered. I have also considered the authorities that both parties have relied on.

10. As was held in the case of *Kahindi Ngala Mwagandi vs. Mtana Lewa (2014) eKLR*, adverse possession is the process by which a person can acquire a title to someone else's land by continually occupying it in a way that is inconsistent with the right of the owner, for twelve (12) years.

11. The Plaintiff has annexed documents showing that he applied for, and was allowed by the government to divert water to the suit land for irrigation purposes. Indeed, the Defendant's director has admitted that when he bought the land, there was a temporary structure on the land which he was promised will be removed.

12. It is trite that the question as to when time started running for the purpose of computing time to ascertain if twelve(12) years have lapsed since the Plaintiff dispossessed the true owner of the land, or since he took possession of the land, and whether such dispossession or possession was continuous and peaceful, is factual in nature. Consequently, this court can only ascertain the Plaintiff's claim after taking viva voce evidence.

13. The Defendant's director having admitted that the Plaintiff or someone unknown to him, has a structure on the suit land, the most appropriate order to issue is that of an injunction so as to maintain the prevailing status of the suit land pending the hearing of the suit.

14. The order of injunction is therefore granted on the basis that the Plaintiff has shown, prima facie, that he has, or someone else, has been utilizing the suit land even before the Defendant purchased it. For those reasons, I allow the Application in terms of prayer number 3.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13<sup>TH</sup> DAY OF APRIL, 2018.**

**O.A. ANGOTE**

**JUDGE**