



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 462 OF 2017**

JONES MAVUTI KISYULA.....1<sup>ST</sup> PLAINTIFF

FATUMA IBRAHIM GOLICHA.....2<sup>ND</sup> PLAINTIFF

EVELYN WANZA MUSAU (*Suing as legal representative of*

KATANI COMMUNITY SHG.....3<sup>RD</sup> PLAINTIFF

**VERSUS**

HARON GEKONGE NYAKUNDI.....1<sup>ST</sup> DEFENDANT

JOYCE N. GIKUNDA.....2<sup>ND</sup> DEFENDANT

LA- NYAVU GARDENS LTD.....3<sup>RD</sup> DEFENDANT

TITUS NGUTI MUSYOKI.....4<sup>TH</sup> DEFENDANT

DAVID WAMBUA MASIKA.....5<sup>TH</sup> DEFENDANT

TOM MBALUTO.....6<sup>TH</sup> DEFENDANT

WILSON MWONGA NGOKA.....7<sup>TH</sup> DEFENDANT

DANIEL MUSYOKA NDONYE.....8<sup>TH</sup> DEFENDANT

SAMUEL KIOKO MUUMBI.....9<sup>TH</sup> DEFENDANT

MWITO INVESTMENT CO. LTD.....10<sup>TH</sup> DEFENDANT

ATHI GREENS LIMITED.....11<sup>TH</sup> DEFENDANT

NEW KIVAE NGWATANIO WELFARE SOCIETY.....12<sup>TH</sup> DEFENDANT

**RULING**

1. This Ruling is in respect to several Applications and Notices of Preliminary Objections. In the first Application dated 23<sup>rd</sup> November, 2017, the Plaintiffs sought for the following orders of injunction:

*a. That the Respondents be restrained by either themselves, their agents, servants or any other persons acting under their instructions from interfering with the members of Katani Community Self Help Group peaceful possession, occupation and use of the parcels of land now known as L.R. No. 12610/2, L.R. No. 12610/3, L.R. No.12610/4 and L.R. No. 12610/5 situate in North East of Athi River pending the hearing and determination of the main suit.*

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

2. The said Application is premised on the grounds that the members of Katani Community Self Help Group have all along been in possession of parcels of land known as L.R. No. 12610/2; L.R. No. 12610/3; L.R. No. 12610/4 and L.R. No. 12610/5 situate in North East of Athi River; that the said members were in possession of L.R. No. 12610 before the said land was sub-divided into several portions and that an order of injunction should issue restraining the Defendants from interfering with their peaceful possession of the suit land.
3. In response to the said Application, the 3<sup>rd</sup> Defendant's Director deponed that the 3<sup>rd</sup> Defendant purchased L.R. No. 12610/4 from Eva Three D. Construction Limited; that the 3<sup>rd</sup> Defendant has been enjoying peaceful occupation and possession of the land until the year 2011 when some individuals trespassed on the land and that the 3<sup>rd</sup> Defendant filed a suit which is HCCC No. 337 of 2011 seeking for a declaration that it was the legal owner of L.R. No. 12610/4. According to the 3<sup>rd</sup> Defendant, the said suit was decided in its favour by this court on 6<sup>th</sup> July, 2012.
4. According to the 3<sup>rd</sup> Defendant, the court barred the Defendants from entering in the said suit or any other person from trespassing on its land and that the Defendants do not have a prima facie case with chances of success.
5. On his part, the 5<sup>th</sup> Defendant deponed that he has been the registered proprietor of L.R. No. 13668 (original number 12160/2/3 comprising of 39.37Ha since 1988; that he purchased L.R. No. 12610/2 measuring 236.1Ha together with his friends under the business name of Mwito Investments Company and that they terminated their tenancy in common of L.R. No. 12610/2 by a Deed of Partition in 1988.
6. The 5<sup>th</sup> Defendant deponed that after partitioning the land into six (6) portions measuring 39.35Ha, he continued being in possession of his portion which is L.R. No. 13668. The 5<sup>th</sup> Defendant deponed that the Plaintiffs are not entitled to the orders sought and that they legally purchased the suit land from BAT Kenya Development Limited.
7. The 7<sup>th</sup> Defendant stated that portion number 13669 is currently registered in favour of Novillera Company Limited; that in 1984, her late husband, together with his friends purchased L.R. No. 12610/2 measuring 236.1Ha from BAT Kenya Development Limited and that the said land was sub-divided into six (6) portions measuring 39.35Ha and apportioned among the six proprietors. According to the 7<sup>th</sup> Defendant, she has been in possession of the suit land since it was purchased to date.
8. The 7<sup>th</sup> Defendant finally deponed that there have never been squatters on L.R. No. 13669 and that the suit land has never been ancestral land as claimed by the Plaintiffs. It was the deposition of the 7<sup>th</sup> Defendant that he engaged in farming on the suit land until the year 2000 when he built a girls' school known as Danana Girls Secondary School and that the school is still running to date. The 7<sup>th</sup> Defendant denied that L.R. No. 13670 was the Plaintiffs' ancestral land.
9. The 8<sup>th</sup>, 6<sup>th</sup> and 4<sup>th</sup> Defendants reiterated the deposition of the other Defendants on how they purchased the suit land from BAT Limited and later on sub-divided it amongst themselves. According to the said Defendants, they acquired their respective portions with vacant possession and that they have been in occupation of the land since 1984 when they purchased it.
10. The 9<sup>th</sup> Defendant deponed that he transferred L.R. No.13671 to Utisi Farms Limited; that he acquired the suit land with vacant possession having purchased the same with his friends in 1984 and that the company undertakes horticultural farming on the entire land to date. The 9<sup>th</sup> Defendant denied that the Plaintiffs are on the suit land or that the said land is their ancestral land.
11. In addition to the said Replying Affidavits, the 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants filed a Notice of Preliminary Objection dated 27<sup>th</sup> February, 2018. In the said Notice of Preliminary Objection, the Defendants averred that the suit and the Application dated 23<sup>rd</sup> November, 2017 are time barred; that the suit is premised on L.R. No. 12610/2 which ceased to exist in the year 1988 and that the suit should be struck out with costs.
12. While the Notice of Motion dated 23<sup>rd</sup> November, 2017 and the Preliminary Objection of 27<sup>th</sup> February, 2018 were pending, and after some of the Defendants had filed their Defences, the Plaintiffs filed an Amended Plaint dated 4<sup>th</sup> April, 2018. The said Amended Plaint introduced an alternative prayer in the following terms:

***“C1. An order of this Honourable Court that the Plaintiffs have acquired prescriptive rights of ownership by way of adverse possession of all the properties known as L.R. No. 12610/2, L.R. No. 12610/3, L.R. No. 12610/4 and L.R. No. 12610/5 having lived on the land without any disturbance for a period of over twelve (12) years and the Registrar of Lands do issue Certificates of Title in the names of the Plaintiffs to hold in trust for her members.”***
13. The filing of the Amended Plaint gave rise to the filing of the Notice of Motion dated 17<sup>th</sup> April, 2018 in which the 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants sought for the striking out of the Amended Plaint. The Application is premised on the grounds that the Amended Plaint was filed without the leave of the court; that the claim for adverse possession must be commenced by way of an Originating Summons and not a Plaint and that the Plaint does not contain the necessary particulars of the claim of adverse possession.
14. In response to the Defendants' Application and Preliminary Objection, the Plaintiffs filed a Notice of Motion dated 23<sup>rd</sup> May, 2018 in which they sought for the striking out of the Memorandum of Appearance filed by the 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants on 28<sup>th</sup> February, 2018; the striking out of the Defences by the same Defendants and the striking out of Defences of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants.
15. The Application by the Plaintiffs dated 23<sup>rd</sup> May, 2018 is premised on the ground that the Defendants were required to enter appearance within twenty one (21) days of the date of advertisement which lapsed on the 27<sup>th</sup> February, 2018 and that although the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup>

Defendants entered appearance within the said twenty one (21) days, they filed their Defences outside the requisite fourteen (14) days.

16. As if the Applications and the Notices of Preliminary Objection on record were not enough, the 6<sup>th</sup> and 8<sup>th</sup> Defendants weighed in with another Application dated 30<sup>th</sup> May, 2018 in which they sought for the striking out of the Amended Plaintiff. The said Application was premised on the ground that the Plaintiffs do not have the *locus standi* to institute the suit.

17. In response to the Application dated 30<sup>th</sup> May, 2018, the 1<sup>st</sup> Plaintiff deponed that as a registered Self Help Group, the group can sue through its officials and that the issue of *locus standi* does not arise under the current constitutional dispensation.

18. All the parties filed their respective submissions which I have considered. I have also considered the filed authorities.

19. The first issue that I will deal with is whether the Plaintiffs have the *locus standi* to institute these proceedings.

20. In the Plaintiff, the Plaintiffs have averred that they bring the suit as the legal representatives of Katani Community Self Help Group (SHG) which is a registered group under the Ministry of Gender and Social Affairs and that they have more than one thousand members who have settled on L.R. No. 12610/2; L.R. No. 12610/3; L.R. No. 12610/4 and L.R. No.12610/5. The three Plaintiffs have indicated in the heading of the Plaintiff that they are representing the said group.

21. It is true that Self Help Groups registered under the Ministry of Gender and Social Affairs have no capacity to institute a suit in their own names. However, where such a group has officials, who have been mandated by the rest of the members to institute a suit on behalf of the members, they can file a suit in their names. Indeed, the persons bringing such an action on behalf of the group have to demonstrate that they have the permission of the members to institute such a suit.

22. This suit has not been instituted by the Self Help Group in its name, but rather, by people who represent the members of the group. Whether the three individuals have the authority of the said group to institute the suit can only be determined at trial and not at this stage. Of course, the mere fact that the group was registered recently cannot be used to defeat the Plaintiffs' claim, and the claim of the members of the group that they have been occupying the suit land for many years.

23. I say so because people can come together by way of a Self Help Group for the purpose of filing a suit. The date of registration of such a Self Help Group cannot be equated with the longevity of the existence of the members of the group. The 6<sup>th</sup> and 9<sup>th</sup> Defendants' claim that the Plaintiff should be struck out because the Plaintiffs' Self Help Group was registered in the year 2016 cannot therefore hold. It cannot be said that the right of action of the members of the group only accrued from the date the group was registered because, as I have stated above, the Self Help Group in itself does not have the capacity to sue and be sued.

24. To the extent that the Plaintiffs will have to prove at trial that they have the authority of the members of Katani Community Self Help Group to file this suit on their behalf and that the individual members have recognized rights under the law in respect to the suit land, I find the 6<sup>th</sup> and 9<sup>th</sup> Defendants' Application dated 30<sup>th</sup> May, 2018 to be unmeritorious. The same is hereby dismissed.

25. The second issue that I will determine is whether the Memorandum of Appearances and Defences filed by the Defendants should be struck out for having been filed out of time.

26. It is not in dispute that the 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants filed their Memorandums of Appearance on 28<sup>th</sup> February, 2018 and their Defences on 13<sup>th</sup> March, 2018. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed their Defences on 2<sup>nd</sup> March, 2018 while the 4<sup>th</sup> and 6<sup>th</sup> Defendants filed their Defences on 4<sup>th</sup> April, 2018.

27. The Defendants were required to enter appearance within twenty one (21) days from the date of service of the Summons to Enter Appearance by advertisement, which was on 6<sup>th</sup> February, 2018. According to the record, the 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants entered appearance on 28<sup>th</sup> February, 2018. Indeed, if the date of advertisement is excluded, the Memorandum of Appearance should have been filed on 27<sup>th</sup> February, 2018 and not on 28<sup>th</sup> February, 2018.

28. Although the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants filed their Memorandums of Appearance within the twenty one (21) days stipulated by the court, they all filed their Defences outside the requisite period of fourteen (14) days from the date of filing of their Appearances.

29. It is true that pursuant to Order 7 Rule 1 of the Civil Procedure Rules, where a Defendant has been served with Summons to appear, he shall, unless some other or further order is made by the court, file his Defence within fourteen (14) days after he has entered appearance in the suit.

30. It is true that the parties in a civil claim like this one ought to abide by the Rules. However, as this court held in the case of **Chairman, Secretary and Treasurer, School Management Committee of Sir Ali Bin Salim Primary School & Another vs. Francis Bahati Diwani & 2 others (2014) eKLR**, an omission to fully comply with a provision of the Rules is an irregularity which except in very clear cases, may be cured. The court further held as follows;

***“Striking out of a pleading, especially where the Rule does not expressly provides so, which has been filed out of time is an extreme measure which is resorted to in the clearest of cases where the court, after considering all the facts and circumstances of the case, comes to the conclusion that a party is abusing the process of the court.”***

31. In the case of **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & others (2013) eKLR**, the

Court of Appeal held as follows:

***“... it is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardships and unfairness.”***

32. The Plaintiffs have not shown the prejudice that they will suffer with the filing of the Memorandums of Appearance and Defences out of time. Indeed, considering that the matter has not even proceeded for pre-trial, the prayer for the striking out of the Defendants' Appearances and or Defences cannot be granted in the circumstances of this case. The interest of justice dictates that the said pleadings remain on record to enable the court determine this matter on its merit.

33. The next issue for determination is whether the Amended Plaintiff dated 4<sup>th</sup> April, 2018 and filed on the same day should be struck out. According to the 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants, by the time the said Amended Plaintiff was filed, pleadings had closed and that the Plaintiffs required the leave of the court before filing the Amended Plaintiff; that in any event, the claim of adverse possession which was introduced in the Amended Plaintiff can only be commenced by way of an Originating Summons and that the Amended Plaintiff does not have particulars of the claim for adverse possession.

34. Order 2 Rule 13 of the Civil Procedure Rules provides as follows:

***“The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.”***

35. Order 8 Rule 1(1) of the Civil Procedure Rules states as follows:

***“(1) A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed.”***

36. It is true, as submitted by the advocates for the 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants, that the pleadings in this matter closed on 27<sup>th</sup> March, 2018 in respect to those Defendants, being fourteen (14) days from 13<sup>th</sup> March, 2018 after the servicing of the Statements of Defence upon the Plaintiffs. However, it was not until 4<sup>th</sup> April, 2018 that the 4<sup>th</sup> and 6<sup>th</sup> Defendants filed and served their Defences.

37. The 4<sup>th</sup> and 6<sup>th</sup> Defendants having filed their Defence on 4<sup>th</sup> April, 2018, the pleadings did not close in respect to those Defendants until 18<sup>th</sup> April, 2018, which was fourteen (14) days from the date that the Defences were served on the Plaintiffs' advocate. Consequently, the Plaintiffs were entitled to file their Amended Plaintiff on or before 18<sup>th</sup> April, 2018, which they did on 4<sup>th</sup> April, 2018. The Plaintiffs therefore did not require the leave of the court to file the Amended Plaintiff.

38. The Defendants have also sought for the striking out of the Amended Plaintiff on the ground that the claim for adverse possession must be commenced by way of an Originating Summons, and not a Plaintiff and that there are no particulars in the Plaintiff pertaining to the claim of adverse possession.

39. It is true that pursuant to the provision of Order 37 Rule 7 of the Civil Procedure Rules, an Application made under Section 38 of the Limitation of Actions Act ought to be made by way of Originating Summons. Section 38 of the Limitation of Actions Act 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 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.***

***(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under***

***this Act.***

***(3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.***

***(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.***

***(5) The Minister for the time being responsible for Land may make rules for facilitating the registration of titles to land or to easements acquired under this Act.”***

40. The provisions of Order 37 Rule 7 of the Civil Procedure Rules requiring a claimant who is seeking to be registered as the proprietor of land by adverse possession is applicable in cases where that is the only claim. However, where the claimant is praying, in the alternative, that

he is entitled to land by adverse possession, he can commence such a suit by way of a Plaint. I say so because one cannot raise issues of fraud in an Originating Summons, unlike in a Plaint where different causes of action can be raised (*in the alternative*).

41. Indeed, even where a party has been sued and he wishes to raise the Defence of adverse possession, he can do so either in the Defence or in a Counter-claim. The filing of a Plaint or a Counter-claim in a claim of adverse possession was upheld by the Court of Appeal in the case of *Gulam Miriam Noordin vs. Julius Charo Karisa (2015) eKLR* as follows:

***“It has been held that although that it is the procedural requirement [Order 37 Rule 7 of the Civil Procedure Rules], a party is not precluded from articulating his claim by way of a Plaint. See Mariba vs. Mariba, Civil Appeal No. 188 of 2002. In Njuguna Ndatho vs. Masai Itumo & 2 Others Civil Appeal No. 231 of 1999, this court held that the Respondent’s Counter-claim for adverse possession was misconceived because it ought to have been brought by Originating Summons... That position is no longer tenable. Where a party like the Respondent in this Appeal is sued for vacant possession, he raise a Defence of statute of limitation by filing a Defence or a Defence and Counter-claim... Similarly in Bayete Co. Ltd vs. Kosgey (1998) LLR 813 where the Plaintiff made no specific plea for adverse possession, the plea was nonetheless granted.”***

42. The above decision of the Court of Appeal shows that the strict compliance with form should not be adhered to at the altar of substance. Indeed, the above decision suggests that where a party shows that he has been in occupation of land *nec vi, nec clam, nec precario*, the court can grant him the land even where he has not specifically pleaded that he is entitled to the land by way of adverse possession. The court went further to hold as follows:

***“The court has in Teresa Wachuka Gachira vs. Joseph Mwangi, CA 325 of 2003 expressly stated that irrespective of the procedure adopted, the onus is on the person claiming adverse possession to prove that he has used the land he is claiming nec vi, nec clam, nec precario. It is clear the change in the court’s approach to this question has been dictated by the need to do substantive justice.”***

43. The Plaintiffs are therefore entitled to raise the issue of adverse possession in the Amended Plaint. Indeed, having averred in the Amended Plaint that they have *“all along being in possession of the original parcel of land known as L.R. No. 12610 which was sub-divided without the knowledge or consent of the members of Katani Community Self Help Group,”* the Plaintiffs are not required to provide any further particulars in the Plaint. The Defendants’ contention that the Amended Plaint should be struck out for want of particulars in respect of the claim of adverse possession does not therefore hold.

44. The last issue that I shall deal with is whether the Plaintiffs are entitled to an order of injunction. The Plaintiffs’ Application dated 23<sup>rd</sup> November, 2017 is premised on the ground that they are in possession of L.R. No. 12610/2, 12610/3, 12610/4 and 12610/5. However, according to the Defendants, having purchased L.R. No. 12610/2 measuring 236.1 Ha in the year 1984, they sub-divided the land amongst themselves and took possession of their respective portions. The 1<sup>st</sup> Defendant was registered as the proprietor of L.R. No. 13666, the 3<sup>rd</sup> Defendant was registered as the proprietor of L.R. No. 13667, the 5<sup>th</sup> Defendant was registered the proprietor of L.R. No. 13668, the 7<sup>th</sup> Defendant was registered as the proprietor of L.R. No. 13669, the 8<sup>th</sup> Defendant was registered as the proprietor of L.R. No. 13670 while the 9<sup>th</sup> Defendant was registered as the proprietor of L.R. No. 13671.

45. It is apparent from the Defendants’ pleadings that the land that they purportedly purchased and sub-divided amongst themselves is L.R. No. 12610/2. Some of the Defendants are in actual possession of their respective portions of land. Indeed, one of the parcels of land has a Secondary School while on the other parcel of land, the Defendant is doing horticultural farming.

46. I have perused the Plaintiffs’ annexures and I have not come across the copies of the titles in respect of the parcels of land they want to be declared the owners. Indeed, this court cannot, on the face of the Notice of Motion dated 23<sup>rd</sup> November, 2017 ascertain the specific parcels of land that the Plaintiffs are claiming that they are entitled to.

47. As I have stated above, L.R. No. 12610/2 seems to be the same land that the Defendants sub-divided in 1988, thus creating new numbers. The said parcel of land does not exist as L.R. No. 12610/2 anymore. This court has not been briefed on the existence of L.R. No. 12610/3, L.R. No.12610/4 and L.R. No. 12610/5 or the owners of those parcels of land. Indeed the Defendants neither own those parcels of land nor are they claiming them.

48. Although the Plaintiffs exhibited three (3) photographs showing a few structures, they did not inform the court the parcels of land on which those structures are standing on. In any event, the structures exhibited in the said photographs cannot host more than ten (10) people at ago.

49. Having not annexed the copies of the titles of the parcels of land that they are claiming, and in view of the fact that there is no nexus between the three (3) photographs annexed on the Plaintiffs’ Affidavit and L.R. Nos. 13666-13671, I find that the Plaintiffs have not established a prima facie case with chances of success in respect to those parcels of land.

50. Further, and in the absence of evidence showing any developments that they have made on L.R. Nos. 13666-13671, the Plaintiffs will not suffer any irreparable damage that cannot be compensated by way of damages if the injunctive orders are not granted.

51. For those reasons, I dismiss the Application dated 23<sup>rd</sup> November, 2017 but with no order as to costs. The Applications dated 17<sup>th</sup> April, 2018, 23<sup>rd</sup> May, 2018 and 30<sup>th</sup> May, 2018 and the Notice of Preliminary Objection dated 27<sup>th</sup> February, 2018 are also dismissed with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2018.**

O.A. ANGOTE

JUDGE