REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C CASE NO. 183 OF 2017

ROMAN NYOIKE MUGACIA

GATHUA MUNYU

SIMON KIINGATI

MARY NJOKI NJUGUNA

MARY MUGURE..................................PLAINITIFFS/RESPONDENTS

VS

MAKINDI BANKS LIMITED..........................DEFENDANT/APPLICANT

RULING

1. On the 16th February 2017, the Applicant filed a Notice of Motion seeking the following orders; -

i. Spent

ii. A temporary injunction preventing the Respondents, their servants and or agents from burning bushes, trespassing, encroaching, cultivating, fencing and or in any manner dealing with the Applicant's land LR. NO 5991 and the contested 100 metres parcel of land.

iii. That the suit be struck out with costs as it raises no cause of action against the Applicant.

iv. Alternatively, the Respondents be ordered to deposit security for costs in Court or an interest earning joint account in the names of the Advocates.

v. A temporary injunction preventing the Respondents, their servants, and/or agents from burning bushes, trespassing, encroaching, cultivating, fencing and or in any manner dealing with the Applicant's LR 5991 and the contested 100 meters parcel of land pending the hearing and determination of the Originating Summons dated 3rd November, 2016.

vi. Costs of this application be borne by the Respondents.

2. The Respondents had filed their Originating Summons dated 3rd November 2016 seeking a declaration that they had adversely occupied respective portions of Land Parcel No. 5991 for twelve uninterrupted years and that the Applicant herein be compelled to transfer the portion to their respective names.

3. In reply to the Originating Summons, the Applicant filed a replying affidavit dated 9th January 2017 and shortly followed with the instant Application under Certificate of Urgency on the 16th February 2017.

4. In their replying affidavit dated 3rd March 2017, the Respondents opposed the Application and stated that the Applicant's application is a side show as they are claiming prescriptive rights over portions of land that they have been occupying on the Applicant's land (100 meters) for a long time without the Applicant raising a claim over the said occupation. That they have been cultivating the disputed parcel of land since time immemorial. That when the river flooded in September//October 2016, they abandoned their cultivated areas and waited until the floods were over by which time the reeds and bushes had grown necessitating the clearing of the same to allow another season of cultivation.

5. The Respondents further averred that River Makindi is their only source of water for both domestic use and farming and that they must cross the disputed parcel of land (100 meters) before getting to it (river). That their occupation and use of the land has not been objected to by the Applicant despite the same happening in its full knowledge. That the Applicant has threatened to fence off the land and if this is allowed they will be cut off from the river, which is a source of water for them. That their suit raises weighty issues which cannot be wished away by the Applicant's application which does not show any cause of action. Regarding the prayer for security of costs, the Respondents aver that it is an attempt to shut them out of the seat of justice and that the same can be recovered from them in form of costs, if any. They conclude by stating that the Applicant has not demonstrated that they will suffer any loss or damages due to their continued use of the disputed land hence do not qualify for injunctive orders.

6. The parties agreed to canvass the Application by written submissions and both filed their written submissions citing case law where applicable in support of their positions.

7. In their submissions, the Applicant attacked the pleadings of the Respondents on grounds that the other Respondents have not mandated the 1st Respondent to swear the Affidavit on their behalf thus rendering the replying affidavit and by extension the originating summons fatally incompetent and urged this Court to strike it out with costs. It relied on Order 1 rule 13 of the Civil Procedure Rules in beseeching the Court to strike out the suit. The provisions are as follows; -

> *"(1)* **Where there are more Respondents than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more Applicants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.**
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> **(2) The authority shall be in writing signed by the party giving it and shall be filed in the case."**

I shall return to this issue later in this ruling.

8. The Applicant has substantially submitted on the issue of adverse possession. Since the main suit is anchored on the doctrine of adverse possession, It will be improper and against the principle of fair trial to handle this issue at this stage. Adverse possession claims in land can best be proved by oral evidence so as to give the parties ample time to adduce evidence and prove their claims.

9. There are a few facts that have been admitted in the affidavit evidence that are acknowledged by the parties to this application; That there is no dispute that the 100 meters stretch of land is part of the Applicant's Land Ref Number 5991. The Applicant has also asserted its rights of ownership on the 100 meters stretch of land. That the Respondents admit that the Applicant has made attempts to evict the Respondents from the 100 meters stretch but the Respondents have resisted the eviction.

10. In deciding whether to grant the temporary injunction sought by the Applicant, I rely on the precedent setting case of **Giella Vs. Cassman Brown (1973) EA 358** in which the conditions for the granting of an interlocutory injunction were settled 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 be normally 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.”**

11. In **Mrao Vs First American Bank of Kenya Limited & 2 others**, a *prima facie* case was described 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 latter.”**

12. Has the Applicant **shown a prima facie case with a probability of success**? Though the Applicant has stated that they own the land (100 meters strip of land- part of L R No. 5991 hereinafter referred to as the land), no document of title has been annexed to support that averment. It is noted that from the evidence adduced by the Respondents that they too acknowledge that the land thus belongs to the Applicant. It is therefore common knowledge between the parties that the land belongs to the Applicant. That does not excuse the Applicant from presenting documents to proof ownership of the suit property. I have seen the copy of the title for LR 5991 on record but on it there is no entry that shows that the Applicant is the registered owner. There is a surrender agreement attached to a copy of a title for Land Reference No. 5591 by Makindi River Estate Limited. There is no entry to show that the Applicant Makindi Banks Limited became the owner of this land. I have also not seen any document to show how the land was transferred to the Applicant noting that the names Makindi River Estates Limited and Makindi Banks Limited are not identical. The Applicant has stated in its affidavit evidence that it bought the land in 1995, which averment has been acknowledged by the Respondents as well. In the end the Applicant has not presented any document of ownership in respect to their ownership of the 100 meters or the Land Reference Number 5991. The onus to proof ownership rested on the Applicant which I hesitate to state has not been discharged. Indeed, it is the Respondents that have attached the copy of the impugned title and not the Applicant as it should have been.

13. Has the Applicant demonstrated that the Respondents have not been in continuous occupation of the land to his exclusion? The Applicant’s position is that the Respondents have since time immemorial never tilled, built or cultivated the land. That they have not been in continuous occupation and that they only invaded the strip and started cultivating on the 21st December 2016 but they were chased away when their intentions were thwarted by the security team on the farm. They resisted and came back again and there have running battles on the land. The Respondents on the other hand claim that they have been farming vegetables and bananas during the dry season and retreat in the rainy season when the river banks flood and the 100 meters land become marshy and uncultivatable. Given the above responses by the parties, there are in existence triable issues that are incapable of being tried on affidavit evidence at this instant. The Respondents in their written submissions have also acknowledged this observation and opined as such in para 25 and 26 therein.

14. Given that the title documents have not been presented to this Court, the Court cannot conclusively hold that the Applicant to be the owner much as there is an acknowledgement by both parties. The document of title to proof ownership must be presented to the Court. From the above the Applicant has not discharged the *prima facie* test.

15. If the interlocutory injunction is not granted, will the Applicant suffer irreparable injury that cannot be remedied by compensation with damages? For the Court to make up its mind that irreparable injury cannot be compensated it has looked at the averments of the Applicant made in the supporting affidavit of Francis Mwangi Kirugu that the Respondents moved to the land in December 2016/January 2017. He has attached photographs to document the 100 meters portion vis a vis the part owned by the Respondents. The Respondents have countered by saying that they have been farming on the land during the dry season

and have invited the Court to examine pictures of the crops; sukumawiki (kales) and bananas that they have been growing to state that they have been there before the December 2016/January 2017.

16. Given their alleged claim is for adverse possession because of long time occupation, at this point the Applicant much as it is in its best interest to show that these Respondents have not been seasonally using the land and that it has by itself been using the said piece of land, has not made any averments in that regard. It is noteworthy that the 1st plaintiff has installed the generator over the 100 meters strip and that the Respondents have generally been accessing water using the strip. The Applicant has not responded to counter the allegations. It has also not countered the allegations by the Respondents that the Applicant wants to fence off the 100 meters strip to keep them off from accessing the water source. The Applicant avers that if the Respondents continue doing what they have been alleged to be doing- burning and clearing the land, they will be damaging the land. The Respondents response is that they are doing this because of their previous alleged rights of occupation meaning that they are not destroying the land in their estimation, but preparing it for cultivation in readiness for the season. The allegations of occupation or otherwise by the Respondents do go to the heart of the determination of the rights vis a vis those of the parties. The Respondents have deponed in their affidavit that they will be able to compensate the Applicants for any loss that they may have caused on the land. The Applicants have asserted that the Respondents are persons of means and acknowledge that they have capacity to compensate the damages, if any.

17. Neither the Applicants not the Respondents have demonstrated to this Court the nature of injury or amount of damages that may arise because of the conduct of the Respondents complained of. Such disclosure would have enabled the Court to determine the amount of damages which the Applicant or the Respondents may suffer and even assist the Court to determine the basis in the application for a security of costs in the sum of Kes. 2.5 million. In the end this test has not been met.

18. Where does the balance of convenience then tilt to? In this instant case, the Court is in doubt in respect to the prima facie case with a probability of success as well as whether the Applicant will suffer irreparable injury that cannot be compensated adequately with damages. It then should now look at the balance of convenience. This test calls for the Court to apply the maintenance of status quo to the situation. Status quo is the position at the time of filing the suit. At the time of filing suit, were the Respondents on the suit land? The answer is yes or no depending on the correct finding on the Applicant's averments that the Respondents moved on to the land after the suit was filed. Why were they then being accused of burning and clearing the bushes? They have not denied it and, infact, they have explained it off that they do so during the dry season in readiness for cultivation and move out during the rainy season. It therefore shows that they have somewhere they go during the rainy season. The Applicant has explained that they have their own lands that they own and work on ordinarily.

19. The Applicant has stated that the Respondents were not on the land at the time of filing suit. However a clear look at the kales and banana trees depict that some are mature and shows that they may have been planted a while ago. Seeing the pictures, it renders the case of the Applicant *prima facie* true. However, somebody must have planted the bananas and the kales. It would also appear that the vegetation is still young. From the exhibits, there is unmistakable evidence that there has been use of the land on the face of the photos. It creates doubt whether the Respondents moved to the land after filing the suit or it has been on and off (seasonal) situation. It may be true that they may have come after a season but not afresh as the Applicant states. In the circumstances, the status quo on the date of filing suit would appear to be that the Respondents were farming on the suit land but seasonally meaning that the actual status quo is doubtful given the evidence on record.

20. Given my findings on prima facie case, possible irreparable injury and the status quo and considering the affidavits so far filed by the parties, the Court is satisfied that the claim of the Respondents and that of the Applicant cannot be ascertained and rights determined with finality in the form of the suit was filed. Being an originating summons, the case requires formal evidence to proof certain facts by the Respondents and lay ground for the Applicants assertion that it is the owner of the land and the Respondents have not used the land to its exclusion to be given titles pursuant to adverse possession.

21. There is also another matter of a technical nature that the Respondents needed to file written authority giving the 1st Plaintiff mandate to swear the affidavit on their behalf. I agree with what the Applicants have stated as the law. The Respondents have admitted the misadventure in their submissions. Though I have been called upon to strike out the suit and the affidavits on that ground, I hesitate to do so at the application stage.

22. On the issue of availing the parties and the Court the opportunity to adduce viva voce evidence I am guided by Order 37 rule 19 (1) and (2) which state as follows;

> **"(1)Where, on an originating summons under this Order, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits.**
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> **(2) where the Court makes an order under sub rule (1), Order 11 shall apply".**

This will allow the parties to adduce evidence in respect to their positions in relation to the issues in controversy or contention.

23. There are two other limbs of the Applicant's application that I need to address before I pen off, that is that the suit be struck off with costs on grounds that it raises no cause of action against the Applicant and that in the alternative the Respondents be ordered to pay security for costs. The first one goes to the heart of the trial and am hesitant to drive the Respondents out of the seat of judgment at this stage on affidavit evidence without the Court testing the veracity of the same by way of viva voce evidence. The second issue rests on my discretion as a Judge and in this case, I reserve this for the trial as well.

24. I also note that the parties have run the full course to argue their positions on the merits or otherwise of the originating summons in their written submissions instead of canvassing the application for interlocutory injunction which is the subject of this matter. I have disregarded the arguments for now.

25. In the upshot, I make the following orders;

> **1. That the Applicant's application is not merited and is hereby dismissed.**
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> **2. That the originating summons as filed and pursuant to order 37 Rule 19 be converted into a plaint and the replying affidavit a defence.**
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> **3. The Respondents be at liberty to make any amendments that they consider necessary to their originating summon to comply with the requirements of a cause of action in a suit filed by way of a plaint within 14 days. The Applicant be at liberty upon being served with the amended originating summon to file his defense and counterclaim, if any, within 14 days.**
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> **4. If the Respondents do not comply with order 3 above the leave granted will be deemed to have lapsed and if the Applicant is not served with amended originating summon it is at liberty to take the originating summon and affidavit as though it were a plaint and file and serve their defence and counterclaim, if any, within the period prescribed under order 3 above.**
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> **5. Parties have 30 days to comply with order 11 and be at liberty to set down the case for hearing at the registry.**
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> **6. Costs of the application shall abide the outcome of the case.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 28th APRIL 2017.

J. G. KEMEI

JUDGE

Ruling Delivered in open Court in the presence of:

Plaintiff/Respondent - Absent

Defendants/Applicants - Mr.Wanjohi

Susan/Kuiyaki - C/A

J. G. KEMEI

JUDGE