



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC NO. 250 OF 2014 [ OS ]**  
**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT**  
**CAP 22 LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF ADVERSE POSSESSION OF THE PROPERTY**  
**KNOWN AS LAND REF. NO.337/991 MEASURING 4.884 HA**  
**BETWEEN**  
**SILVESTER PETER NDETI.....PLAINTIFF**  
**VERSUS**  
**CECILIAM SITUMAI NDETI}**  
**CAROLINE MWELU NDETI }**  
**MICHAEL KYENDE NDETI }**  
**MKWAMA KIVUTO NDETI }**  
**RAPHEAL KYALO NDETI }.....DEFENDANTS**  
**RULING:**

The Plaintiff /Applicant herein **Silvester Peter Ndeti** has brought this Notice of Motion dated 4<sup>th</sup> march, 2014, seeking for various Orders. The orders sought are:-

- a. *Spent*
- b. *Spent*

- c. *That the honourable court be pleased to issue and/or grant temporary Orders of injunction to restrain the Defendants/Respondents, their agents and/or servants from evicting, trespassing, or encroaching onto, alienating, selling or in any manner whatsoever interfering with the applicant peaceful and quiet enjoyment, possession, occupation and use of the property known as land Reference No.337/991 situated in Athi-River pending the hearing and determination of this suit.*
- d. *That the Respondents do bear the costs of this application.*

The application was supported by the grounds stipulated on the face of the application and on the supporting affidavit of **Silvester Peter Ndeti**.

Among the grounds in support of the application are that; from the year 1992 to the year 1998, **Elizabeth Mukulu Ndeti** (now deceased) occupied and put into use land parcel No.Ld 337/991 by carrying on cultivation after which she leased out the portion to 3<sup>rd</sup> parties for the same purpose; further that in the year 1999, the applicant approached his late mother, **Elizabeth Mukulu** and sought to enter into the said land and carry out farming activities upon which his request was granted by his mother, with the consent of his father **Peter Nzuki Ndeti**; That the applicant took possession and occupation of the suit property from the year 1999 and has carried out extensive developments and built a permanent building and also carried out extensive underground piping and connected electricity; therefore the applicant has had quiet uninterrupted use and possession of the suit land since 1999; Further that the registered proprietor **Kivuto Ndeti** (deceased) and Defendants have not taken action to disposes the plaintiff of the suit property nor interfere with his quiet possession of the same; That the Defendants interest and title to the said property occupied by the applicant have been extinguished by virtue of the continuous adverse possession of the land by the Plaintiff; that the Defendants are now threatening to evict the Plaintiff from the said property and the plaintiff stands to suffer irreparable loss and damage if he is evicted from the property.

In his Supporting Affidavit, **Silvester Peter Ndeti**, reiterated what had been stated in the grounds in support of the Notice of Motion and averred that unless the Respondents and their agents are restrained by an order of this court, they may make good the threat of unlawfully evicting the applicant from the property and demolishing all developments therein.

The application is vehemently opposed by the Respondents. **Cecilia Situmai Ndeti**, swore a Replying Affidavit and averred that she has been authorized by the other Defendants to reply on their behalf . She averred that she is one of the administrators of the Estate of her late husband **Prof. Kivuto Ndeti**, who passed on, on 31<sup>st</sup> March 2012. She further averred that the said **Prof. Kivuto Ndeti** was the registered proprietor of the parcel of land known as **LR No. 337/991** and that **Peter Nzuki Ndeti** the father to the applicant was his brother. She further averred that her late husband, allowed his brother **Peter Nzuki Ndeti** (father to the Plaintiff) and his wife to use the land as they took care of it. It was her contention that the parents of the applicant used the land with the permission of her late husband. Further, that Plaintiff was invited by his mother to the land in the year 2005 to assist her with the farming activities.It was her allegations , that the Plaintiff also started using the land with the permission of her late husband , who is the registered owner.

The Respondent deponed that her late husband was ready to use the land in the year 2009 and he informed his brother **Peter Nzuki Ndeti** of that intention and it was agreed that Plaintiff would vacate the land after getting due notice. However, the Plaintiff has failed to honour the verbal notices.

The Respondent further deponed that the Plaintiff was given a written Notice to vacate the property on 23<sup>rd</sup> October 2010 but again he failed to honour it. Once more , her late husband attempted to remove the Plaintiff on 4<sup>th</sup> November, 2010 by having the electricity disconnected but the Plaintiff failed to vacate the suit land. She contended that the plaintiff has not had 15 years of continuous uninterrupted occupation of the property but he has had possession of the same with the permission of her late husband which permission was withdrawn when the Plaintiff was given notice to vacate the property but he failed to do so. Respondent averred that plaintiff has failed to establish a claim of adverse possession and he is not entitled to the orders sought.She urged the court to dismiss the applicant's Notice of Motion.

In his supplementary Affidavit, the applicant averred that it was evident that the Respondents did not deny that his late mother, **Elizabeth Mukulu Ndeti** was in occupation of the suit land and carried out activities thereon. He further averred that his mother occupied the land in question as of right but not with the consent of the registered proprietor. He further reiterated that he is still in occupation of the property in dispute and has occupied the same since 1999.

The applicant also denied that there have been any attempts by the registered proprietor to evict him from the land in issue and the letters referred to by the Respondent did not amount to eviction. He further reiterated that he has been in continuous uninterrupted occupation of the suit land for over 12 year and that entitles him to the relief sought.

The parties herein canvassed the instant Notice of Motion by way of Written Submission. I have now carefully considered the instant application, the relevant laws, and the written submissions by both parties herein and I make the following findings;

The applicant herein has brought this suit as an Originating Summons. His claim is for **adverse possession**. He has alleged that he has been on the suit land for over 12 years which occupation has been continuous, uninterrupted, and peaceful. He further alleged that the Respondents have threatened to evict him and thus the filing of this Notice of Motion seeking injunctive Orders. It was also his contention that the suit land is registered in the names of **Kivuto Ndeti**, whose right got extinguished by virtue of limitation of actions and adverse possession.

However, on their part, the Defendants have alleged that the plaintiff's parents had been allowed and permitted to use the suit land by **Prof. Kivuto Ndeti**, the registered proprietor of the suit land. Further that the Plaintiff /applicant only started using the land in the year 2005 when his mother started ailing and that his entry to the suit land was also with the permission of the registered owner.

In deciding this Notice of Motion, I will take notice of the fact that at this stage, I am not required to determine the very issues which will be canvassed at the trial with finality. See **Edwin Kamau Muniu Vs Barclays Bank of Kenya Ltd Nairobi ( Milimani) High Court Civil Case No.1118 of 2002.** At this stage the court is not called to conclusively find whether the applicant has proved his claim of adverse possession or not. The court at this interlocutory stage is not required to make any conclusions or determine findings of fact or law on the basis of contradicting Affidavit evidence or disputed propositions of law. (**See Airland Tours and Travel Ltd Vs National Industrial Credit Bank, Nairobi ( Milimani) High Court Civil, Case No. 1234 of 2002.**)

However, all that this Court is entitled at this stage is to find and hold whether the applicant is entitled to an injunction sought on the basis of the usual criteria of whether he has made a prima facie case with probability of success, whether or not he has shown that he is likely to suffer injury which cannot be adequately compensated by an award of damages and if court is in doubt, to decide on a balance of convenience. See **Giella Vs Cassman Brown Co. Ltd (1973) EA 358.**

So has the applicant herein established that he has a prima facie with probability of success?. In the case of **Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125.** The Court of Appeal described prima-facie case as:-

***“A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.***

In the instant suit and application, the applicant alleged that he has been in continuous and uninterrupted occupation of the suit land since the year 1999. He however admitted that it was his mother **Elizabeth Mukulu Ndeti** who had been using the land since 1998. The Respondents on their part alleged that the mother of the applicant had been using the land since 1999 with the permission of the registered owner **Prof. Kivuto Ndeti**. They further alleged that the applicant was invited to the land in the year 2005

by his mother when she started ailing and that was also with the permission of the registered owner.

From the letters dated 23<sup>rd</sup> October, 2010 and 4<sup>th</sup> November, 2010, it is evident that the registered owner, **Prof.Kivuto Ndeti** had attempted to remove the applicant from the suit land. Even without attempting to deal conclusively, with the facts that will be dealt with at the main trial, I find that it is not indeed true that the applicant has been in continuous uninterrupted occupation of the suit land. The registered owner herein **Prof. Kivuto Ndeti** had attempted to remove the plaintiff from the suit land in the year 2010.

**Section 26** of the **Land Registration Act** states that whoever is the registered proprietor of a suit land has absolute ownership of the same. Section 26 reads as follows:-

***“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—“***

There is evidence that the registered owner **Prof. Kivuto Ndeti** passed on in the year 2012 and the Defendants herein are his beneficiaries. The Defendants therefore cannot be barred from dealing with the suit land before the Court of law determines whether the applicant is entitled to be registered as the proprietor of the suit land by virtue of adverse possession or not. I find and hold that the issues raised by the applicant can only be determined by the court after a full trial and calling of evidence. The Court finds that applicant has not established that he has a prima facie case with probability of success.

On the second issue of irreparable loss, it is evident that whatever developments that the applicant has put up on the suit land can be quantified. In the case of **American Cynamid Company Vs Ethycon Ltd (1975) IALL ER 504**, the court held that: -

***“If damage in the measure recoverable at common law could be an adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the Plaintiff claim appear to be at that stage.”***

I find that in the instant case, the applicant would adequately be compensated by an award of damages in the event he succeeds in the main suit in future.

On the third condition of if the court is in doubt, I find that there is no doubt herein, and if there was any, I hold that the Defendants are the beneficiaries of the registered owner of the suit land and the balance of convenience tilts in their favour.

Having now carefully considered the pleadings herein in totality and the Written Submissions, the court finds that the applicant’s Notice of Motion dated 4<sup>th</sup> March 2014 is not merited. The upshot of the foregoing therefore is that the said Notice of Motion is hereby dismissed entirely with costs to the Respondents. It is so ordered.

Dated, signed and delivered this **11<sup>th</sup> day of July, 2014**

**L.GACHERU**

**JUDGE**

In the presence of

Mr. Mbindyo for the Plaintiff/Applicant

Mr.Tu’gei for the Defendants/Respondents

Kamau : Court Clerk

**L.GACHERU**

**JUDGE**

**11/7/2014**