



**Sila v Al-Haiee Investments Limited & 4 others (Environment & Land Case 1030 of 2016) [2023] KEELC 178 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 178 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1030 OF 2016  
OA ANGOTE, J  
JANUARY 19, 2023  
IN THE MATTER OF SECTION 37 & 38 OF THE  
LIMITATION OF ACTIONS ACT CAP 22, LAWS OF  
KENYA  
AND  
IN THE MATTER OF ACQUISITION OF L.R. NO.  
209/12071/1 BY WAY OF ADVERSE POSSESSION**

**BETWEEN**

**FERDINARD MUAIA SILA ..... PLAINTIFF**

**AND**

**AL-HAIEE INVESTMENTS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**FREDRICK KATHANZU T/A KANYUNI CONTRACTORS .. 2<sup>ND</sup> DEFENDANT**

**JAMES KYALO T/A SECOND TRY CONSTRUCTION  
COMPANY ..... 3<sup>RD</sup> DEFENDANT**

**REGISTRAR OF COMPANIES ..... 4<sup>TH</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. By way of a Notice of Motion dated July 14, 2022, the Plaintiff has sought for the following orders:
  - a. An order do issue allowing the Plaintiff to re-enter, occupy and rebuild his demolished premises and unconditionally reverting the status quo herein to the status pertaining



immediately prior to the illegal eviction of the Plaintiff on the July 5, 2022, pending hearing and determination of the suit.

- b. A prohibitory injunction do issue barring the 1<sup>st</sup> Defendant, itself, its agents, servants, employees, proxies or otherwise howsoever from again evicting or attempting to retake possession by demolishing or otherwise howsoever interfering with the Plaintiff's quiet and peaceful occupation of the suit property, pending the hearing and determination of this suit.
  - c. That the costs of this application be provided for.
2. The grounds of the application are set out on the face of the Motion. The application is also supported by the Supporting Affidavit sworn by the Plaintiff, Ferdinand Muaia Sila, who deponed that he has enjoyed quiet possession of the suit property for more than twenty-seven (27) years since 1995 and has filed this suit to crystallize his claim on the suit property.
  3. The Plaintiff deponed that on July 5, 2022, the 1<sup>st</sup> Defendant unlawfully and with the help of hired goons and persons in police uniform, violently invaded the suit property, demolished his premises and destroyed his properties and that the said eviction was done without a court warrant and rendered him and his family destitute and that they are currently living in the cold.
  4. The Plaintiff urged that the demolition and eviction was intended to permanently and mischievously remove him from the suit property thus destroying the evidence of his possession and occupation of the land which was key in the suit for adverse possession. The Plaintiff contended that there was a need that the status quo prior to the illegal demolition and eviction on July 5, 2022 be maintained and to be allowed to occupy the suit property and rebuild his premises so that he could defend his case from the same footing that he had before the demolition.
  5. It was deponed that the 1<sup>st</sup> Defendant in a quest to illegally obtain eviction orders against him filed CMCC No 6683 of 2017 Al-Haiee Investments Limited vs Patrick Muinde Katunga seeking injunctive orders against him and that there is also another suit being Milimani ELC Petition No E017 of 2022 involving the same subject matter and involving the 1<sup>st</sup> Defendant herein.
  6. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants supported the application vide a Replying Affidavit dated July 25, 2022 sworn by Fredrick Kathanzu Kavuthi, the 2<sup>nd</sup> Defendant, who prayed that the orders sought by the Applicant be granted and the status pertaining immediately prior to the illegal eviction be restored.
  7. The 2<sup>nd</sup> Defendant deponed that both the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants entered into an agreement with the 1<sup>st</sup> Defendant for the construction of an 8-foot-high wall around the suit property for the sum of KShs 700,000; that the 1<sup>st</sup> Defendant failed to pay them and its officials left the country and that they entered the suit property in 1997 to hold the same as lien against the unpaid contractual sum of KShs 4,600,000 and have been in uninterrupted possession of the suit land for the last 21 years.
  8. According to the 2<sup>nd</sup> Defendant, upon the lapse of the statutory period, they moved the court on October 22, 2013 in ELC Suit No 1234 of 2013 (OS) Fredrick Kathanzu Kavuthi t/a Kanyuni Constructors Limited and James Kyalo t/a Second Construction Company Versus Al-Haiee Investments Limited, claiming adverse possession ownership of the suit property and that ELC 1234 of 2013 was dismissed for want of prosecution on May 12, 2022, due to the mistake of their counsel.
  9. It was the 2<sup>nd</sup> Defendant's averment that on February 6, 2014, the 1<sup>st</sup> Defendant mobilized a mob of youths who illegally entered the suit property and attempted to evict them from the suit property and that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants sought and obtained orders for maintenance of Status ante on February 10, 2014, which were served upon the 1<sup>st</sup> Defendant, OCS Embakasi Police Station and all other parties.



10. It was deponed that despite the said orders, the 1<sup>st</sup> Defendant purported to enter and interfere with their quiet possession and assaulted, purported to arrest and evicted their workers from the suit property.
11. The 2<sup>nd</sup> Defendant deponed that the 1<sup>st</sup> Defendant in abuse of the court process instituted Petition E017 of 2022 on May 31, 2022 as well as a suit in the Magistrates' Commercial Court at Milimani suing a third party, Geoffrey Majiwa, being MCCC No E2958 of 2022 and that in the said suit, the 1<sup>st</sup> Defendant herein sought temporary orders of injunction against the Defendant in that suit to restrain him from trespassing onto the suit land and preventing it from carrying out construction works.
12. The 2<sup>nd</sup> Defendant asserted that the application was heard ex parte on June 2, 2022 and the court granted the injunction orders sought and directed the OCS Milimani to effect the said orders, which were later extracted on June 3, 2022 and that the 1<sup>st</sup> Defendant consequently entered the disputed suit property on July 5, 2022 under the armed protection of 20 police officers, used heavy machinery to destroy the wall that had been erected in 1995 and also demolished the temporary house made of iron sheets erected on the said property. These events, it was deponed, were captured by the 2<sup>nd</sup> Defendant's askari.
13. The 1<sup>st</sup> Defendant, through a Replying Affidavit sworn on July 25, 2022, opposed the application on the grounds that the Plaintiff has not occupied the suit property for 27 years and that CMCC No 6683 of 2017, AL-Haiee Investments Limited vs Patrick Muinde Katunga was intended to restrain the Defendants therein from purporting to offer the suit property to members of the public for sale.
14. It was deponed by the 1<sup>st</sup> Defendant that ELC Petition No E017 of 2022 is meant to restrain members of the National Police Service, particularly from Embakasi Police Station, from interfering with and arresting the 1<sup>st</sup> Defendant's contractors and/or employees under the guise of preserving status quo pending determination of this suit and ELC No 1264 of 2013 (OS).
15. The 1<sup>st</sup> Defendant denied the allegations that the Plaintiff was illegally evicted from the suit property on July 5, 2022 on the grounds that the Deputy Registrar's report dated July 26, 2019 indicated that the Plaintiff has never had physical possession of the suit property and could thus not be evicted.
16. It was deponed that the suit property is charged to I&M Bank Limited to secure an amount of KShs 370,000,000 and therefore neither the 1<sup>st</sup> Defendant nor the chargee can concede to the Plaintiff's prayers in this suit. Lastly, it was deponed that the 1<sup>st</sup> Defendant continues to meet its statutory obligations over the suit property.
17. It was deponed by the 1<sup>st</sup> Defendant that during the construction of the Nairobi Express Way, part of the suit property was acquired by KENHA, which necessitated the demolition of part of the perimeter wall bordering Mombasa Road and that the impact of the demolition and excavation of the road weakened the rest of the wall, such that structural engineers advised that the wall be demolished and reconstructed to avoid collapse in future.
18. According to the 1<sup>st</sup> Defendant, the demolition began in May 2022 but reconstruction of the perimeter wall has been slowed due to interference by the Commanding Officer of Embakasi Police Station and his officers who have been harassing and arresting the contractor and his staff.
19. The 1<sup>st</sup> Defendant argued that granting the orders the Plaintiff has sought would constitute a gross violation of its right to property, as protected under Article 40(1) of the [Constitution](#) and that the Plaintiff's application has been brought pursuant to misconceived and erroneous provisions of the [Civil Procedure Rules](#) which do not empower this Court to grant the Plaintiff's prayers. The Plaintiff and the Defendants filed submissions and authorities which I have considered.



## Analysis and Determination

20. Upon review of the application dated July 14, 2021, the responses by the Defendants and the submissions by the parties, the issue for determination in this matter is whether the court should grant the Plaintiff's prayer for mandatory injunction and preventing the 1<sup>st</sup> Defendant from interfering with the Plaintiff's quiet and peaceful occupation of the suit property, pending the hearing and determination of this suit.
21. The Plaintiff's case is that on July 5, 2022, the 1<sup>st</sup> Defendant unlawfully and with the help of hired goons and persons in police uniform, violently invaded the suit property, demolished his premises and destroyed his property. The Plaintiff and the 1<sup>st</sup> Defendant submitted that they have been in occupation of the suit land for the last twenty-seven (27) years, and that the demolition and eviction was intended to permanently and mischievously remove the Plaintiff from the suit property thus destroying the Plaintiff's and the 2<sup>nd</sup> Defendant's evidence of their possession and occupation, which are critical in the claim of adverse possession.
22. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have supported this application and prayed that the orders sought by the Applicant be granted and the status pertaining immediately prior to the illegal eviction be restored. It was deponed that the 1<sup>st</sup> Defendant has abused the court process by filing multiple suits before this court and before the magistrates' court, and has also evicted the Defendants who had previously sued the 1<sup>st</sup> Defendant in a claim for adverse possession.
23. The 1<sup>st</sup> Defendant has opposed the application and urged that the Plaintiff has never had physical possession of the suit property and could thus not be evicted; that the suit property is charged to I&M Bank Limited to secure an amount of Kshs 370,000,000 and that the 1<sup>st</sup> Defendant continues to meet its statutory obligations over the suit property.
24. On the demolition of the wall, the 1<sup>st</sup> Defendant averred that part of the suit property was acquired by KENHA, and that the construction of the Expressway necessitated the demolition of part of the perimeter wall bordering Mombasa Road.
25. Black's Law Dictionary 10<sup>th</sup> Edition defines a mandatory injunction as:-

“ An injunction that orders an affirmative act or mandates a specified course of conduct.”
26. The Court of Appeal aptly stated in the case of Kenya Breweries Limited & another vs Washington O Okeyo [2002] eKLR that a mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances, but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application. This position was upheld by the Appellate Court in Malier Unissa Karim vs Edward Oluoch Odumbe (2015) eKLR as follows:

“ The test for granting a Mandatory Injunction is different from that enunciated in the “Giella –Versus - Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “Kenya Breweries Ltd-Vs- Washington Okeyo (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-



“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application.”

27. Indeed, while courts have been reluctant to grant mandatory injunctions at an interlocutory stage, such orders have been granted where a party establishes that they have a strong and clear prima facie case. This was so held by the court in *Shariff Abdi Hassan vs Nadhif Jama Adan* [2006] eKLR as follows:

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

28. The rationale for such reluctance is the appreciation by the courts that mandatory injunctions have more drastic effects than prohibitory injunctions, and consequently, when sought at an interlocutory stage, such an injunction should not be granted, except in special circumstances or only in the clearest of cases. This position was articulated in *Shepherd Homes Ltd vs Sandham* [1971] 1 Ch 34, which was quoted with approval by the Court of Appeal in *Lucy Wangui Gachara vs Minudi Okemba Lore* [2015] eKLR:

“[I]t is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation.

...

[O]n motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.”

29. The Plaintiff's case in this matter is for adverse possession. The Plaintiff has averred that it has enjoyed quiet possession of the suit property for more than twenty-seven (27) years and has filed this suit in order to crystallize his claim on the property.
30. In support of his claim, the Plaintiff has produced photographs of his house, which was purportedly demolished. The 1<sup>st</sup> Defendant has admitted that the suit property had a perimeter wall, a portion of which was demolished during the construction of the Nairobi Express Way, while the rest of the wall was demolished because it had become too weak.



31. It is trite that for an occupation to be adverse, it must be done without force, secrecy and should be open. In the case of *Kimani Ruchire vs Swift Rutherford & Co, Ltd* (1980) KLR, the Court held that:-
- “The Plaintiffs have to prove that they have used this land which they claim as of right *Nec vi, Nec clam, Nec precario* (No force, no secrecy, no persuasion). So the Plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavor to interrupt it or by way of recurrent consideration.”
32. In *Haro Yonda Juaje vs Sadaka Dzeno Mbauro & Another* [2014] eKLR, this court rightly articulated five elements that a claimant must prove on a balance of probability for a claim of adverse possession:
- i. One must prove that they have made physical entry on the land and is in actual possession or occupancy of the land for the statutory period.
  - ii. The occupation of the land by the claimant must be non-permissive.
  - iii. The acts done by the claimants must be inconsistent with the owner's enjoyment of the soil for the purpose which he intended to use it.
  - iv. Possession by the person seeking to prove title by adverse possession must be visible, open and notorious. The possessing act must be substantial.
  - v. The possession must be continuous, uninterrupted and unbroken for the required statutory period.
33. While it is apparent that the Plaintiff may have established a prima facie case by virtue of the 1<sup>st</sup> Defendant's admission that the suit property had a perimeter wall which it demolished because it was “weak,” this court is not convinced that there exist special circumstances or that the Plaintiff's case is clear enough to warrant this court to allow the prayer for a mandatory injunction for re-entry into the suit property.
34. The refusal to deny the Plaintiff a mandatory order of injunction will in no way prejudice the Plaintiff's claim for adverse possession because a claim for adverse possession is calculated from when such possession became adverse to the registered owner of the land to the institution of suit.
35. In this suit, the material period is between 1995, when the Plaintiff asserts that he took possession of the suit land and 2016, when this suit was filed. Evidence of occupation of the suit property can be supported by photographic evidence prior to the alleged demolition of the wall and the Plaintiff's structure.
36. On the basis of the foregoing, this court dismisses the Plaintiff's application dated July 14, 2022. Due to the actions of the 1<sup>st</sup> Defendant of demolishing the wall, and in view of the Plaintiff's and the 1<sup>st</sup> Defendant's claim, and the multiple suits in respect of the suit property, an order for the maintenance of the prevailing status quo pending the hearing of the suit should issue.
37. In the circumstances, this court makes the following specific orders;
- a. The prevailing status quo in respect of LR No 209/12071/1 to be maintained by all the parties pending the hearing and determination of the suit, meaning that none of the parties herein should sell, alienate, charge, develop, occupy or change the current status of LR No 209/12071/1 in any way whatsoever until this suit is heard and determined.
  - b. Each party to bear its/his own costs.



**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19<sup>TH</sup> DAY OF JANUARY, 2023.**

**O. A. Angote**

**Judge**

**In the presence of;**

**Mr. Kasuku for Plaintiff**

**Mr. Ombao for Otieno for 1<sup>st</sup> Defendant**

**Court Assistant - June**

