

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 41 OF 2018

JOSEPH GATHITU MUKOMA.....PLAINTIFF

VERSUS

KABU MUMBA MUDACHI.....1ST DEFENDANT

GABRIEL WANDERA2ND DEFENDANT

JULIUS OKUMU.....3RD DEFENDANT

RULING

(In respect of application dated 13 October 2020)

1. This ruling is in respect of the application dated 13 October 2020. It is filed by the defendants who wish to have leave to institute a representative suit by way of a counterclaim, on their behalf and on behalf of the other squatters/residents of Vikwatani, Mombasa, residing on the land identified as Plot No. 830/Section II/Mainland North (Original No. 155/66) (the suit land).

2. Just to place matters into context, the plaintiff filed this suit claiming to own 5.4 acres of the suit land. He averred to have purchased it from one Sammy Shehi Murissa Kumbi. Mr. Kumbi is among the persons claiming to be squatters in the suit land, and these said squatters (the defendants herein included) have another suit, being Mombasa ELC No. 383 of 2009 (OS) which is on-going.

3. The plaintiff in this suit sued the defendants for interfering with the portion of 5.4 acres that he claims to have purchased and he wants them permanently restrained from it. There are orders herein issued by the court (Omollo J) that since the plaintiff claims to have purchased land from a person asserting adverse possession in another suit, then this suit be stayed, until the case of adverse possession is first concluded.

4. In this application, the defendants herein aver to be members of Concordia Development Group (a group claiming to be about 3,000 and who are the plaintiffs in the adverse possession suit). The applicants state that they wish to bring a counterclaim as representatives of Concordia Development Group so as to protect their interests. They have annexed a draft counterclaim which I have gone through. They have referred to the case Mombasa ELC 383 of 2009 (OS) vide which they claim adverse possession. They allege that the plaintiff is also a member of Concordia Development Group and his entitlement is only to two plots of 40X70 feet and not the 5 acres that he claims.

5. The plaintiff has opposed this application. He avers inter alia that the draft amended defence is defective as it does not include the names and particulars of the alleged squatters. He believes that the amendments will cause him great prejudice as it intends to add more than 3000 unknown people. He is further of opinion that this will go to confuse issues, as the case Mombasa ELC No. 383 of 2009 (OS) is on-going. He has pointed to the order of Omollo J, staying this suit.

6. I have considered this application. I wouldn't wish to stand in the way of a party who is of opinion that he/she has a counterclaim to a suit. However, I observe that there is an order staying this suit pending the outcome of Mombasa ELC No. 383 of 2009 (OS). I am of the view that the defendants need to await the outcome of that case, and upon its conclusion, assess their position and determine whether or not a counterclaim in this case is necessary. If I allow the application to proceed at this stage, I will be negating the stay orders issued by Omollo J.

7. Given the above, I have no option but to stay this application pending the outcome of Mombasa ELC No. 383 of 2009 (OS).

8. It is so ordered.

DATED AND DELIVERED THIS 11 DAY OF FEBRUARY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA