



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**MOMBASA ELC NO. 41 OF 2018**

**JOSEPH GATHITU MUKOMAH.....PLAINTIFF**

**VERSUS**

**KABU MUMBA MUDACHI & 2 OTHERS.....DEFENDANTS**

**RULING**

*(Application for injunction filed by the defendants against the plaintiff; defendants claiming that the plaintiff is selling the suit land and interfering with beacons that the defendants have erected; defendants having sued for adverse possession in a separate suit claiming the whole land; plaintiff claiming purchase of a portion of 5.4 acres from one of the persons in the adverse possession case; plaintiff filing this suit to restrain the defendants from interfering with this portion that he alleges to have purchased; plaintiff obtaining an injunction against the defendants upon filing suit; issuing an order of injunction against the plaintiff would run contrary to the earlier order of injunction; in any event no evidence presented that the plaintiff is interfering with the land as alleged by the defendants; application dismissed)*

1. The application before me is that dated 11 May 2020 filed by the defendants. The application seeks orders of injunction against the plaintiff/respondent to restrain him from evicting the defendants/applicants or dealing with the land parcel Plot No. 830/Sec II/MN (Original No. 155/66) (the suit land). The application further seeks orders to restrain the plaintiff/respondent from destroying the defendants' beacons in the said land. The application is based inter alia on grounds that the defendants/applicants are the beneficial owners of the suit land together with other squatters amounting to about 3,000 people. They say that they have settled on this land and that they have filed a case for adverse possession being the suit *Mombasa ELC Case No. 383 of 2009 (OS)*. It is claimed that the plaintiff/respondent is a member of Concordia Development Group and with an intention to obliterate the claims of the applicants over the suit land, has trespassed into it and started destroying or removing the applicants' beacons and selling the plots that he has illegally allocated himself.

2. The supporting affidavit is sworn by Kabu Mumba Mudachi, the 1<sup>st</sup> defendant. He has deposed that he and his co-applicants are the officials of Concordia Development Group (the membership group comprising of the plaintiffs in the case for adverse possession) and that they were sued in this matter as the representatives of the said group. He has deposed that he and the two other defendants reside in the suit land. It is said that the plaintiff/respondent is also a member of the Group and had been allocated, by the Group, two plots of land measuring 40 X 70 feet to be carved out and to be given a number after survey. It is contended that the respondent is now claiming a chunk of the property amounting to 5 acres. It is said that the respondent after filing this suit, obtained interim orders stopping the applicants from interfering with the suit property until the case is heard and that he has now demolished and removed 129 beacons, which had earlier been put up by the applicants, and is now selling the plots. It is averred that the respondent is acting as if the suit has already been heard and determined in his favour.

3. The respondent has filed a replying affidavit to oppose the motion. He has deposed that he has enjoyed occupation of 5.4 acres of the suit land for over 30 years. He has stated that he is not a member of Concordia Development Group. He has deposed that in November 2014, the applicants accompanied by unruly youth invaded his property and destroyed his crops, trees and buildings. He then filed this suit in the Magistrate's Court at Mombasa, which was registered as *Mombasa CMCC No. 2256 of 2014* and obtained injunctive orders against the applicants. The case was later transferred to this court. The applicants had filed the suit *Mombasa ELC No. 383 of 2009 (OS)*, claiming the suit land by way of adverse possession. They subsequently filed an application to have the respondent enjoined in the said suit which application was dismissed in a ruling delivered on 12 July 2018. However, within the said ruling, an order of stay of proceedings of this suit was issued, pending the hearing and determination of the suit *Mombasa ELC No.383 of 2009 (OS)*. He has denied removing any beacons or selling the applicants' plots to third parties. He has deposed that to the contrary, it is the applicants who have been erecting illegal beacons on his property.

4. I allowed counsel for the applicants and the respondent to make oral submissions which they did. They basically relied on what their respective clients have filed.

5. I have considered the matter and perused both this file and the file *Mombasa ELC No. 383 of 2009 (OS)*. I observe that the suit *Mombasa ELC No. 383 of 2009 (OS)* is an Originating Summons filed by the applicants and other persons who claim to be squatters in the suit land, seeking orders that it be declared that they have acquired, by way of adverse possession, title to the suit property. The suit is against Pwani Jezozhum Limited said to be the owners of the suit land. That suit is still pending and there are orders of status quo issued in the matter. The respondent on the other hand filed this suit on 14 November 2014, initially before the Magistrate's Court at Mombasa. In his suit, he claimed to own 5.4 acres of the suit land having purchased it in the year 1984 from one Sammy Shehi Murissa Kumbi. The said Sammy Shehi Murissa Kumbi is among the plaintiffs in the case for adverse possession. He contended that on 7 August 2014, the applicants acting on behalf of Concordia Development Group sent surveyors who wrongfully entered his land and erected beacons. He thus wished to have them permanently restrained from the 5.4 acres which he claimed to own. Together with the suit, the respondent filed an application for injunction against the applicants. The application for injunction was allowed meaning that the applicants were restrained from interfering with the 5.4 acres until the case is heard and determined. There was an application filed on 7 November 2017 by the applicants herein seeking that this suit be consolidated with their suit for adverse possession. The court (Omollo J) reasoned that since the respondent herein claims to have purchased land from one of the plaintiffs in the suit for adverse possession, then this suit ought to be stayed, for the plaintiffs in the adverse

possession case need to first prove their suit. In other words, the court was of opinion that the suit of the respondent was contingent upon the applicants succeeding in their case for adverse possession.

6. Turning back to this application, it will be recalled that the applicants want the respondent restrained from the suit land. I am afraid that the issue of injunction has already been canvassed and there is a ruling restraining the applicants from the 5.4 acres claimed by the respondent. I cannot now issue an injunction against the respondent for that would go counter to the earlier orders of injunction. Further, in as much as the applicants claim that the respondent is interfering with the suit land by destroying beacons and selling it, there is not an iota of evidence to demonstrate this. The applicants have not tendered any evidence of any interference with beacons. There is not even a single photograph annexed by the applicants to their application to show the alleged interference with beacons. There is also not a shred of evidence to demonstrate that the respondent is selling any part of the suit land. No sale agreement or any mention of a name of a person who may have purchased some of the land from the respondent have been demonstrated. I am afraid that the mere allegation that the respondent is doing so does not constitute any proof. Tangible evidence needed to be presented for this court to hold that there is any unlawful interference with the suit land as alleged by the applicants.

7. I really see no point of saying more. There is absolutely no substance in this application and the same is dismissed with costs.

8. Orders accordingly.

**DATED AND DELIVERED THIS 6<sup>TH</sup> DAY OF JULY 2020**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**