



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 390 OF 2017 (O.S)**

**FORMERLY MALINDI ELC NO 177 OF 2015 (O.S)**

**1. YUSTINA KOROKORO**

**2. ALI MUNGA**

**3. FATUMA HASSAN**

**4. KAHINDI KATANA (All suing on behalf of themselves and the**

**other members of Barani Community Self Help Group).....PLAINTIFFS**

**-VERSUS-**

**ELIUD TIMOTHY MWAMUNGA & 16 OTHERS.....DEFENDANTS**

**RULING**

***(Application for injunction filed by two defendants in a suit where the respondents have filed suit for adverse possession; contention that the plaintiffs are demolishing a wall; no evidence of any demolition; injunction cannot issue as the land is already subject to the suit by the plaintiffs for adverse possession; application dismissed but court orders status quo to be maintained)***

1. The application before me is that dated 30 October 2018 filed by Francis Waiganjo Kimanga and Lucy Wanjiru Kimanga, the 7<sup>th</sup> and 8<sup>th</sup> defendants in this suit. The two applicants wish to have orders of injunction to restrain the respondents (who are the plaintiffs in this suit) from demolishing the wall, constructing houses, selling portions of the land, cultivating, cutting trees, clearing bushes, fencing, or in any manner interfering with the applicant's plot LR No. MN/III/2550, until this suit is heard and determined. The applicants also wish to have a mandatory injunction ordering the respondents to pull down their structures from the said land and give vacant possession. They also want an eviction order to remove the respondents from the identified parcel of land and for the OCS, Kilifi Police Station to provide security for the exercise.

2. This suit was commenced on 29 September 2015 by way of an Originating Summons, in the Environment and Land Court at Malindi and registered as Malindi ELC Case No. 177 of 2015 (OS). It was later transferred to the ELC at Mombasa, for the reason that there were two other related matters which had been filed in Mombasa, being Mombasa ELC No. 3 of 2014 and Mombasa ELC No. 214 of 2014. The applicants in the O.S (who for ease of reference I will refer to as the plaintiffs to avoid confusion with the applicant in this application) contended that they have acquired, through the doctrine of adverse possession, several parcels of land belonging to the respondents named in the O.S (hereinafter referred to as the defendants for ease of reference), being the land parcels registered as numbers 313/III/MN, 564/III/MN, 885/III/MN, 2389/III/MN, 2547/III/MN, 2390 (1-12)/III/MN, 2391/III/MN, 2550/III/MN, 2551/III/MN, 2552/III/MN, 9100-9117/III/MN, 508/III/MN and any other subdivisions created from 313/III/MN referred to as the main title. The plaintiffs mentioned that they had been in possession before the year 1991.

3. Together with the suit, the plaintiffs filed an application for injunction seeking to restrain the defendants from evicting them or interfering with their structures. I am not too sure what may have happened to this application, for I seem to be missing some early court proceedings, but I have seen that on 30 October 2015, parties recorded a consent for status quo to be maintained.

4. In this application, the applicants assert that they are the owners of the land parcel MN/III/2550. They state that the respondents are illegally demolishing the concrete fence of the land.

5. The motion is opposed by the respondents through the replying affidavit of Yusuf Bakari Ngao. He has deposed that at no time have they

organised a demolition of the suit land. He has deposed that it is the applicants through their agents, John Ng'ang'a , Karisa Kitunga, and Sammy Mitsanze, who on 18 October 2018, at around 4.00pm, organised the destruction of property and houses belonging to the respondents. He has annexed some photographs which he states demonstrate the said demolition. He has deposed that the agents of the applicants were arrested and taken to Mtwapa Police Station for the offence of destruction of property.

6. Counsel were invited to write written submissions which they did, and I have taken these into account before arriving at my decision.

7. What the applicants want is an order of injunction and a further mandatory order for the eviction of the respondents. I have deliberately set out the history of this case, and I have already mentioned that parties did agree to status quo being maintained pending the hearing and determination of this suit. In this application, the applicants contend that the respondents are illegally demolishing a concrete wall within their land. I have gone through the affidavit in support and nowhere have I been shown any evidence of demolition of any wall. I have not even been shown a single photograph of the wall that is claimed to be subject of the demolition. I have also not been given any evidence of any construction that the respondents may be undertaking on the suit land or any settlements that they may have created after the commencement of this case. It will further be noted that the applicants want the respondents evicted from the subject land but I have no evidence before me of the sort of occupation that they have on the land which would entitle the applicants to an order of eviction. I am therefore not persuaded that there is any evidence of any wall being demolished or any on-going invasion of the land of the applicants, or any new developments on the land, that disrupts the status quo.

8. I appreciate that the applicants have title to the suit land but that title is subject to the proceedings herein where the respondents wish to claim the land by way of adverse possession. The proprietary rights of the applicants are thus subject to the claim of the respondents, and until the suit herein is finalized, this court cannot pronounce itself at this stage on who is ultimately entitled to ownership of the land. That will have to await until this case is heard and determined on its merits.

9. Given the above, I have little option but to dismiss this application with costs. I instead order that the status quo be maintained until this suit is heard and finalized.

10. Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA this 17<sup>th</sup> day of October 2019.**

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**MUNYAO SILA**

**JUDGE.**

**IN THE PRESENCE OF:**

Mr. Birir for the 7<sup>th</sup> & 8<sup>th</sup> defendants/applicants.

Ms Naliaka holding brief for Mr Malombo for the plaintiffs/respondents.

Mr Mwandeje for the 12<sup>th</sup>, 15<sup>th</sup> & 17<sup>th</sup> defendants.

Court assistant; Koitamet