REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC SUIT NO. 88 (O. S) OF 2016

LANGWEI CHARO KARIS

SIDI KANGWI

MARRIAM CHARO BENZI & 65 OTHERS……..……..……APPLICANTS

-VERSUS-

AHMED BIN HAJI BARAWA……..RESPONDENT

RULING

1. The application for determination is dated 25th April 2016. It is brought under the provisions of section 1A, 1B & 3A of the Civil Procedure Act and Order 40 Rule 1 & 2 and Order 51 rule 1. The applicant seeks the following orders ;

1. **Spent**

2. **Spent**

3. **That the Respondents, their servants, agents and/or employees be restrained by way of temporary injunction from dealing, leasing, constructing, selling, wasting, damaging, intruding and trespassing, developing and/or interfering with two parcels of land being subdivision number 402 of Section II Mainland North measuring 5.96 acres pending the hearing and determination of this suit.**

4. **That the county commander of police Mombasa County and Officer Commanding Station O.C.S Bamburi Police Station do assist and/or provided security by restraining the Respondents from dealing with the suit property thus ensuring compliance.**

5. **The Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of the case.**

6. **That the Respondents be ordered to pay costs of this application.**

2. The application is supported by the grounds on the face of it and the affidavit of Kangwei Charo Karisa. Briefly the applicants contend that they have occupied the suit properties peacefully and have known the same to be their only home over the years. Secondly the Respondents are in the process of

evicting the applicants herein albeit unlawfully earmarking the same for destruction.

3. In opposing the motion, the 2nd Respondent filed a 39 paragraph replying affidavit dated 7th September 2016. Mr Abdio Mahmoud Ahmed deposed that he is the administrator of the estate of the 1st Respondent who is deceased. He admitted the deceased was the registered owner of the suit plot No 402/II/MN. He then deposed how they took out letters of administration and obtained a provisional title and that him & the other beneficiaries have been paying rates and rents.

4. The 2nd Respondent denied that they are selling, constructing, wasting or damaging the property but instead have been dealing with the property in his capacity as trustee and administrator. He also deposed that the 1st applicant was appointed caretaker of the suit property and was given a portion to live on and farm. He was therefore surprised that the applicant has been subdividing and selling off portions of the land to willing buyers who are now some of the applicants.

5. The 2nd Respondent continued that he has made numerous trips to the suit property and met the applicants unfortunately the attempts to stop the illegal exercise bore no fruit as the applicants were adamant. He continued that there trips constitute interruptions and hence the applicants' claim for adverse possession cannot stand. The 2nd Respondent deposed further that they reported the dispute to the local administration who then summoned the applicants to a meeting held on 18th March 2016. The respondent deposed that they have been very patient with the applicants in looking for ways and means for them to peacefully vacate the suit land but instead they now want to take the land which rightfully belongs to him and his co – beneficiaries. He urged the Court to dismiss the application as the same is vexatious and an abuse of the Court process.

6. The parties' advocates filed written submissions on which they fully relied on for arguing this application. Both outlined the facts as contained in their pleadings. The applicants added that they have shown they have a prima facie case because they have demonstrated they have been in occupation of the suit land, have built houses, planted coconut trees e.t.c for over 50 years without interruption. That the respondent and his co – beneficiaries have recently began causing interference to their peaceful possession by issuing them with summons to the area chief thus necessitating this application.

7. The Respondent on his part besides the facts submitted that the list of persons annexed as residing on the suit property is factitious. They submit that the applicants have not shown a prima facie case as the applicants should not use the documents annexed to their affidavit to hold the Respondents at ransom. Secondly that the applicants have failed to show that if the orders are not granted, they will suffer irreparable loss that cannot be compensated by an award of damages. The remainder part of the submission is on the main suit as to whether the applicants proved exclusive use. I will refrain from referring to it as this is a determination of an interlocutory application.

8. From the affidavits filed by both parties, it has come out clearly that the applicants are in possession of the suit property. This is demonstrated in paragraphs 16, 24 – 28 of the replying affidavit and annexture ***KCK – 1*** to the supporting affidavit. Annexture ***KCK – 1*** are summons issued by the assistant chief summoning the applicant and stating the subject is about the plot where the applicants live. The Respondents deposed that they made several trips to the suit land in an attempt to have the applicants vacate the land peacefully. These visits bore no fruit. The applicants on their part are claiming they are entitled to the suit land by virtue of adverse possession. The mere fact that they are in possession which is admitted by the 2nd Respondent & his co – beneficiaries in my view settles the principle of prima facie case. With probability of succeeding. Whether the 1st applicant was there as a caretaker or not is an issue to be determined during the hearing.

9. Secondly by virtue of the fact that the applicants are living on the suit property as their home settles the second principle of irreparable loss. No wonder the Respondent opted to report to the local administration to have them vacate peacefully. The Respondent should not now turn around and submit that the applicants have not established that they are likely to suffer irreparable loss. The Chief's letter dated 8th March 2016 reads thus ***"Tafadhali fika hapa ofisini kwa Naibu wa Chifu utange siku ya***

ijumaa tarehe 11.3.2016 saa Nane kwa mazungumzo juu ya ploti unayoishimo. Njoo pamoja na mtoto/watoto wako kwenye huo mkao."

10. This disruption of family life can be safely stated as irreparable and cannot be easily compensated by an award of damages. I am therefore satisfied that the applicants' fears were founded. It is only safe that the orders sought are granted to preserve the status quo and the suit property pending determination of this suit.

11. As a result of the foregoing analysis, I find merit in the present application and proceed to grant the orders 3 & 4. The costs of the application do abide the outcome of the main suit.

Dated and signed this 13th day of March 2017

A. OMOLLO

JUDGE

Delivered at Mombasa this 17th day of March 2017

C. YANO

JUDGE