



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**LAND CASE NO. 99 OF 2014 (O.S)**

**IN THE MATTER OF THE LAND TITLE NO. CR. 9477 BEING LR NO. 5022/19**

**(ORIGINAL 5014/2)**

**AND**

**IN THE MATTER OF SECTION 38 OF LIMITATION OF ACTIONS ACT**

**(CAP 22 LAWS OFF KENYA)**

**AND**

**IN THE MATTER OF AN APPLICATION FOR DECLARATION THAT THE APPLICANTS**  
**HAVE OBTAINED OWNERSHIP OVER A PORTION OF LAND TITLE NO. CR. 9417 BEING**  
**LR NO. 5022**

**(ORIGINAL 5014/2) MEASURING 600 ACRES BY ADVERSE POSSESSION**

**BEETWEEN**

**MOHAMED ABDALLA MWAVUMBANI & 85 OTHERS...APPLICANTS**

**VERSUS**

**MSABWENI DEVELOPMENT CO. LTD..... RESPONDENT**

**RULING**

[1] There are two applications up for ruling. The first is the Plaintiff's application dated 5<sup>th</sup> May, 2014 and later ammended on 2<sup>nd</sup> September, 2014. The second application is by the defendant and is dated 18<sup>th</sup> August, 2015. Both applications were brought under the provisions of order 40 of the Civil Procedure Rules. The plaintiffs' application seeks orders restraining the defendants from interfering with, evicting or preventing the plaintiff's from cultivating or making use of a portion of land known as CR 9477 being LR NO. 5022/19 measuring 600 acres and currently occupied by the plaintiffs pending determination of this suit.

[2] The defendant's application equally seeks injunction restraining the respondents from entering, slashing, occupying, cultivating, building on or howsoever dealing with any portion of LR NO. 5022 pending determination of the suit. Both applications are supported by the affidavits and are also opposed by the Replying Affidavits.

[3] The Plaintiffs annexed an official search for CR 9477 to show the property is owned by the defendant which ownership the defendant has not denied but that the acreage stated is not the correct one. The plaintiff's aver that they have lived on a specified portion for a period of over 12 years, cultivating the same with food crops such as mangoes and cashew nuts. They stated that they had built structures and lived peacefully until 2010 when unknown people went and told them the land belongs to them.

[4] Further that the said defendant used security guards and police from Msambweni police station to restrain the plaintiffs from making use of the land they occupy which is approximately 600 acres. The plaintiff's deposed that at one time the defendant agreed to give them the areas they occupy but later reneged. They urged that the orders be granted.

[5] The defendant on his part said they bought the land as a going concern on 7<sup>th</sup> February, 1977 and have always had estate managers between 1996 to date. That the attempts to invade commenced in 2010 which they have repulsed all efforts for the squatters from Gazi village and Duruma from entering and remaining on our land except on Easter Saturday 4<sup>th</sup> April, 2015 when a section of the Respondents/Plaintiffs with 3<sup>rd</sup> parties invaded a portion measuring 10 acres of LR 5022 allegedly on permission of the area member of parliament.

[6] In the replying affidavit filed against the plaintiff's application, the defendant deposed through an affidavit sworn on its behalf by Colonel (Retired) Joseph Nguru that LR 5022 measures about 15.6 acres and not 600 acres as postulated by the Plaintiff. According to the defendant, there is absolutely no one on this land residing or cultivating. Further the defendant claims this suit is an afterthought as it was filed three years after the defendant had filed suit for trespass and eviction.

[7] The defendant deposes that 32 of the plaintiff's herein appear in the former suit as shown in the list attached and marked C. He also stated that some of the Plaintiffs are former employees. The defendant contested the allegation that the Plaintiffs have always tilled the suit land and deposed that some of the people listed may not be actual persons. He also listed in paragraph 20 some of the plaintiffs who have known homes particularly Nos. 1, 3, 53, 17, 32, 26, 29 in the list. The defendant admitted invasions by squatters on a portion of land LR 5022 measuring 30 acres but they do not allow them to farm. The defendant urged the court to dismiss the Plaintiff's application.

[8] Both parties filed written submissions. The Plaintiffs reiterated the contents of their pleadings stating that their applications meets the threshold set for granting injunction. That the applicants will suffer irreparable loss as they solely depend on this land. In submitting on the defendant's application, the plaintiff submits that they have lived on the land peacefully and it is the defendant who has a habit of disturbing them using security agents. He urged the court to dismiss the defendant's application. The defendant also reiterated the facts set forth in the pleadings and urged the court to allow their application and dismiss the plaintiff's application.

[9] The issue for determination is to find out who between the plaintiffs and the defendant has established the threshold for granting of the orders of injunction. The Plaintiffs claim the land they are occupying is measuring approximately 600 acres comprised on land reference No. 5022 CR NO. 9477. They annexed a postal search for the suit plot showing it measures 2159 in acres but which has been sub divided into various plots. The Plaintiff also annexed 3 photographs taken on 11<sup>th</sup> March, 2014 to show their structures on the land.

[10] The first photograph shows some young crops/grass with grown trees ahead. The 2nd photograph is a well while the 3<sup>rd</sup> is a house with 3 ladies and 3 children in the background. There are 86 Plaintiffs in this case who say they are occupying 600 acres of the land. The applicants did not specify who is the owner of the house shown in the photograph or who dug the well. All they said is that they have lived on the land for over 12 years.

[11] The defendant in rebutting this allegation stated that all attempts by the Plaintiffs to occupy the land have been thwarted. The defendant also explained in the replying affidavit the background details of some

of the plaintiffs i.e those living in their homes which are separate from this land and some who are former employees who may not sustain a claim for adverse possession ( paragraphs 7 – 13) and that some of the Plaintiffs have participated in the former suit NO. HCC 60 of 2011 and 463 of 2010. These depositions by the defendant were not controverted by the Plaintiffs by way of filing a supplementary affidavit.

[12] In the Plaintiffs replying affidavit to the defendant's application, the plaintiffs did not deny paragraph 19 and 20 of the defendant's affidavit in support of that motion which itemized the homes of where some of the 20 plaintiffs are located to verify to his court that indeed the Plaintiffs are on the land. Further the 1<sup>st</sup> Plaintiff has not denied that he is aware of the existence of Hcc No. 60 of 2011 although he deposed that it is different from this application.

[13] On the basis of the uncontroverted averments put forth by the defendant and the existence of two previous suits (namely HCC No. 60 of 2011 and No. 463 of 2010), this court's mind is put in doubt as to whether the Plaintiffs have established a prima facie case with a probability of succeeding. I am also not satisfied that indeed the Plaintiffs are physically in occupation of the portion of the suit property measuring 600 by merely displaying one house which looks unoccupied and a well. This cannot indeed convince this Court that this is how the 86 Plaintiffs are living on the land. The balance of convenience thus does not tilt in favour of the plaintiffs to deserve the grant of the orders sought.

[14] On the contrary to the Plaintiff's claim the defendant has demonstrated that they have always utilized the land and the Plaintiffs are not in possession. The defendant has also shown the existence of two suits involving some of the parties herein clearly showing the plaintiffs came to court with unclean hands by filing a duplex suit. Lastly the defendant has shown this court that some of the Plaintiffs have homes and if the orders are not granted, the Plaintiffs will take occupation and unduly benefit to the detriment of a registered title holder. Consequently I am satisfied that the defendant is deserving the orders sought in prayer 2 of the motion dated 8<sup>th</sup> April, 2015.

[15] In conclusion, I do dismiss the Plaintiff's amended notice of motion dated 2nd September, 2014 with Costs to the defendant. Secondly I do allow the defendants application dated 8th April, 2015 with no order as to Costs.

**DELIVERED, DATED and SIGNED at MOMBASA this 29<sup>th</sup> day of June, 2016**

**A. OMOLLO**

**JUDGE**

**In the presence of:-**