



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 234 OF 2015

BENSON C. MBOGO & 2 OTHERS.....PLAINTIFFS

-VERSUS-

MADONGA KENGA MASHA & 12 OTHERS.....DEFENDANTS

RULING

1. The three plaintiffs sued the thirteen (13) defendants vide their plaint dated 21st September 2015. Together with the plaint, they filed an application dated the same date. The application is premised under the provisions of Order 40 Rule 1, 2 & 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It sought orders ;

1) Spent

2) Spent

3) That the O.C.S Bamburi police station be directed to provide the plaintiffs with all necessary security and protection from the Defendants and other potential invaders pending the hearing of this application inter parties.

4) That the Honourable Court be pleased to issue a temporary injunction restraining the defendants by themselves, their agents, employees or assigns from trespassing into, remaining, settling, selling or in any manner whatsoever dealing with that portion of the property known as Plot No 422/1/MN pending the hearing and determination of this suit.

The application is supported by the grounds on the face of it and on the affidavit of Benson C. Mbogo.

2. The application was served on the Defendants. The defendants filed a replying affidavit sworn by Bididi Juma – the 4th defendant and dated 23rd March 2016. Vide the replying affidavit, the defendants opposed this application claiming that the applicants have no right over the suit property as they have no title document nor have they been in occupation. Besides opposing this application, they also filed an application dated 17th March 2016.

3. In the application by the defendants, they sought for orders ;

i) Spent

ii) Spent

iii) That the Respondents their servants, agents or employees be restrained by way of temporary injunction from dealing, leasing, constructing, selling or wasting or intruding and trespassing or interfering with the applicants' peaceful occupation of plot No 422/1/MN pending the hearing and determination of this suit.

iv) The O.C.S. Bamburi Police Station do provide security by restraining the Respondents to ensure compliance with the order.

The application was supported by the grounds listed on its face and the affidavit of the 4th Applicant.

4. The advocates for both parties agreed that these two applications be heard together since they sought similar orders. In the interim, they agreed to maintain orders of status quo. I wish to point out that the plaintiffs opposed the defendants' application vide a replying affidavit of Benson Mbogo sworn on 9th June 2016. The advocates opted to rely on the pleadings as filed although later the plaintiff filed some skeleton submissions which was filed on 26th July 2016.

5. In the plaintiffs' affidavit they depose that their father lived on this land from 1940s even before they were born. Later they were born on this land, grew up and established their own homes on the land. That they have also planted coconut, mango, citrus and orange trees on the land. The plaintiff averred that they even made attempts at purchasing the suit property from Habib Abdulla – deceased who is the registered owner but this process was not completed due to the death of the said Habib. The applicants annexed copies of letters exchanged during the sale process which happened in 1977. All these prove the plaintiffs have indeed been in occupation of the suit property.

6. The defendants on their part also deposed they have been on the suit property for a period over twelve years. According to them, the plaintiffs only recently trespassed on the suit property claiming to be the owners and started evicting them albeit unlawfully. That the plaintiffs started destroying their houses in an attempt to evict them from the land. The Defendants also averred that they have filed a case vide Originating Summons No 40 of 2016 against the registered owner seeking adverse possession. They annexed copies of the pleadings in MSA ELC O.S. 40 of 2016. They also annexed copies of some structures that have been damaged.

7. The photographs are temporary structures which one cannot easily read that the defendants have been on the land for over 12 years. Secondly the iron sheets look new. I could see a house on the background in one of the photos but it did not come out in the defendants' pleadings that it could be one of their houses. I find the defendants have not laid a satisfactory basis for seeking the injunction orders against the plaintiffs.

8. Both parties have admitted that the suit property is registered in the name of Habib Abdulla – deceased. The Originating Summons taken out against the said Habib may be a non – starter. However such an order would be made in that particular file. For purposes of this application the taking out of the Originating Summons does not give the defendants any rights in priority over the plaintiffs' case since it was filed after this suit and it is filed against a deceased defendant. I am therefore not convinced that the defendants have made out a prima facie with a probability of succeeding.

9. In conclusion, I am satisfied that the plaintiffs' application dated 21.9.2015 has merit and is allowed in terms of prayers 3 & 4 of the motion. Costs of the application to abide the outcome of the main suit. The defendants' application dated 17th March 2016 is hereby dismissed with no order as to costs. The plaintiff is however warned not to use these orders to carry out any eviction exercise or demolish any structures. If there are any structures on the land, the same to await the determination of suit.

Dated and delivered at Mombasa this 14th day November 2016

A.OMOLLO

JUDGE