



**REPUBLIC OF KENYA**

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

**CHUKA ELC CASE NO 165 OF 2017**

**FORMERLY MERU ELC CASE NO.50 OF 2016**

**CATHOLIC DIOCESE OF MERU (MUKOTHIMA PARISH).....PLAINTIFF**

**VERSUS**

**MONDESTO NJERU.....DEFENDANT**

**RULING**

1. In an application dated 17<sup>th</sup> May, 2016, Father Eliud Mwenda, for the plaintiff, sought the following orders:

1. The application be certified urgent and the same be heard on priority, expeditiously and ex parte in the first instance.

2. The Honourable Court be pleased to grant an order of temporary injunction to restrain the defendant/respondent, his relatives, agents, servants, neighbours, friends, representatives and anybody acting at the defendant/respondent's behest from burying/interring the remains of his wife – the late Stellah Mukamogao And or in any other way whatsoever interfering with the plaintiff/applicant's land measuring 182 acres or thereabout and situate within Gatunga village of Mukothima location of Tharaka Nithi County pending hearing and determination of the application interpartes.

3. The Honourable Court be pleased to grant an order of temporary injunction to restrain the defendant/respondent, his relatives, agents, servants, neighbours, friends, representatives and anybody acting at the defendant/respondent's behest from buying/interring the remains of his wife-the late Stellah Mukamogao And or in any other way whatsoever interfering with the plaintiff/applicant's land measuring 182 acres or thereabout and situate within Gatunga village of Mukothima location of Tharaka Nithi County pending hearing and determination of the main suit.

4. The OCS Gatunga Police Station be ordered to ensure compliance.

5. The respondent/defendant do meet the costs of the application.

2. The application is supported by the affidavit of Father Eliud Mwenda, the priest in charge of Mukothima Parish and has the following grounds:

a) The plaintiff is the sole owner of the suit land.

b) The respondent is about to inter the remains of his late wife on the suit land without the

plaintiff/applicant's permission.

c) The plaintiff/applicant stands to suffer irreparable loss, damage and prejudice if the orders sought are not granted.

d) It is in the interest of justice that the orders sought be granted.

3. The defendant opposed this application through his replying affidavit sworn on 23.5.2016 which states:

“I, **MODESTO NJERU**, the defendant herein do hereby swear this affidavit and state as follows:

1. That I'am the defendant/respondent herein competent to swear this affidavit in opposition to the plaintiff/applicant's motion herein dated 17<sup>th</sup> May, 2016

2. That the application has been read and explained over to me by my Advocate Mr.Ndubi and I now fully understand its content.

3. That both the application and indeed the main suit are misplaced, an abuse of the process of the Honourable court, bad in law and fatally defective and deserve to be dismissed with costs.

4. That both the application and indeed the main suit are **Res judicata** in view that there is another suit (being **Meru HCCC No.235 of 1992**) which was determined way back in the year 2005 between the same parties and over the same subject matter. Annexed and marked “**MN1**” respectively are self-explanatory copies of the plaint and decree in the same said matter.

5. That the plaintiff herein lost in Meru HCCC aforesaid with the result that eviction orders were made against it from the suit land and which orders were to be executed by the court bailiff with the assistance of the OCS Gatunga Police Station. I annex as “**MN2**” a self explanatory Court Order/warrant to that effect.

6. That instead of obeying the Honourable Court's decree in Meru HCCC 235/1992 aforesaid, the applicant/plaintiff has through its representatives all along ganged up with the OCS Gatunga police station to frustrate the implementation and execution of the decree herein.

7. That I annex as “**MN3**” as true copy of a warrant to the Court bailiff dated 17.12.2008 which is self explanatory.

8. That the decree in Meru HCCC 235/1992 has never been overturned either.

9. That without disclosing to the Honourable Court again on 5thMay, 2016, the same plaintiff herein proceeded to file Marimanti PMCC No.0/2016 against me over the same subject matter and which it withdrew on 18.5.2016 after my Advocate raised a Preliminary objection seeking its striking out. I annex a bundle of the pleadings, the Preliminary Objection and Honourable Court's ruling thereof as “**MN4**” all of which are self explanatory.

10. That the plaintiff applicant is out to mislead the Honourable Court given that he has intentionally chosen not to make any disclosure over the foregoing two suits and which disclosure is material to the fair and just determination of both the present application and the main suit.

11. That the applicant is, hence before the Honourable Court with soiled hands and does not deserve the Honourable Court's indulgence.

12. That the plaintiff is therefore, merely employing unorthodox and backdoor means to defeat the decree in **Meru HCCC No.235/1992**.

13. That I'am not out to bury the remains of my late wife on any of the plaintiff/applicant's land but

on the portion decreed to me and my other co-plaintiffs in **Meru HCCC 235/1992**.

14. That the plaintiff is merely out to punish me and my family for no plausible reason.

15. That the plaintiff/applicant stands to suffer absolutely no prejudice if I were to inter the remains of my late wife on the suit land as decreed by the Honourable Court in Meru **HCCC 235/1992**.

16. That it is all inhuman for the applicant/plaintiff which is a holy church of God to keep delaying the burial of my late wife for no justifiable reason.

17. That I plead with the Honourable Court to dismiss the application with costs.

18. That all I have stated herein is true to the best of my knowledge and belief.

4. The defendant has filed an application dated 23<sup>rd</sup> November, 2016 which seeks orders that:-

1. The application be certified as urgent and the same be heard *ex parte* in the first instance and a date be given for *inter partes* hearing on priority basis.

2. The Honourable Court be pleased to discharge/set aside the interim Orders of injunction granted herein on 5<sup>th</sup> May, 2016.

3. Further to the Honourable Court's Orders of 23<sup>rd</sup> September, 2016 the Honourable Court do itself set a specific date for the scene visit to the locus in quo.

4. The Honourable Court be pleased to strike out the suit pursuant to the provisions of Section 7 of the Civil Procedure Act Cap 21 on account of being ***Res Judicata***.

5. The Honourable Court be pleased to make any other Orders in the interest of justice.

5. This application is supported by the affidavit of **MODESTO NJERU**, the defendant and has the following grounds:-

(i) That the plaintiff/respondent has been very reluctant and uncooperative and has completely frustrated the Orders made by the Honourable Court on 23<sup>rd</sup> September, 2016 requiring the parties, and their Advocates together with the Executive Officer and the County Surveyor to visit the locus.

(ii) The plaintiff/respondent's intention in refusing to co-operate as aforesaid is to continue enjoying the interim Orders illegally and perpetually.

(iii) The suit and indeed the plaintiff/respondent's application for injunction dated 5<sup>th</sup> May, 2016 are ***Res Judicata*** and an abuse of the process of the Honourable Court as there is a final decree in **Meru HCCC No.235/1992** between the same parties (*inter alios*) and the plaintiff and over the same land/subject matter herein).

(iv) The remains of the applicant's wife have been lying in mortuary since 28.3.2016 as a result of the interim Orders on record.

(v) The mortuary bills have gone up to Kshs.200,000 and the plaintiff/applicant who is an aged man and a peasant farmer without a stable source of income might not be in a position to settle the same at the end of the day.

(vi) Further continued stay of the defendant/applicant's wife remains at the mortuary is traumatizing and torturous to the defendant, his entire family and indeed the entire community.

(vii) It is in the interest of justice that the Orders sought be granted.

6. This application has spawned this ruling, and if it succeeds, any other application and the main suit will have been rendered superfluous and veritably pleonastic.

7. This application was canvassed by way of written submissions.

8. The main argument proffered by the defendant is that this suit is *res judicata* Meru HCCC No.235/1992.

9. The plaintiff's main argument is that the issue of *res judicata* does not arise because in Meru HCCC No.235 of 1992 the suit was between NDUME NTUIRI & 53 Others VERSUS CATHOLIC DIOCESE OF MERU GATUNGA involving a land dispute whereas the instant suit is between DIOCESE OF MERU (MUKOTHIMA PARISH) VERSUS MODESTO NJERU involving a burial dispute.

10. The plaintiff submits that in this suit the plaintiff is sued on personal capacity as MONDESTO NJERU and it is argued that he is trying to drag the names of the other 53 plaintiffs in Meru HCCC No.235 of 1992 who are not party to the instant suit. It is further submitted that the defendant is trying to resolve a land dispute through a burial dispute.

11. In its plaint, the plaintiff prays for judgment against the plaintiff in the following terms:

a) A permanent injunction to restrain the defendant, his agents, servants and relatives from interring the remains of one Stellah Mukamogao and any other body of his relatives on the suit land and or in any other manner interfering with the suit land herein measuring 182 acres situate within Mukothima Location in Tharaka/Marimanti within Tharaka Nithi County.

b) Costs of the suit and interest.

12. In her ruling delivered on 28<sup>th</sup> July, 2005 in NDUME NTUIRU & 53 OTHERS VERSUS CATHOLIC DIOCESE OF MERU AND GATUNGA CATHOLIC MISSION, the Honourable Lady Justice Ruth N. Sitati, J, ruled as follows:

*“In the result, I would allow the applicant’s application dated 14.3.2005 in terms of prayer (3) thereof to the extent that the decree dated 26.8.1997 be amended to show that any person squatting, farming or grazing on the 82 acres belonging to the Gatunga Catholic Mission should move out so as to enable the diocese to go ahead with their development plans for the benefit of the community. The record is clear that 98.82 acres of the suit land belong to the plaintiffs.”*

13. I have carefully examined the pleadings and the submissions proffered by the parties with regard to the defendant’s application dated 23<sup>rd</sup> November, 2016.

14. When dealing with the plaintiffs application dated 17<sup>th</sup> day of May, 2016 (op.cit) which spawned the interim orders which were issued by this court on 18<sup>th</sup> May, 2016, both parties have used dilatory tactics to delay the conclusion of that application and the hearing and determination of the main suit.

15. On 25.5.2016, Mr. Ndubi for the defendant intimated to this court that there was a likelihood that the parties could reach an amicable understanding. He asked the court to allow the parties to come to court for directions on 30.5.2016. Mr Ndubi’s intimation was not challenged by the plaintiff.

16. On 30.5.2016, the parties once again intimated that there was a possibility of them reaching a settlement out of court.

17. On 5.9.2016, the parties, by consent, moved the court to order a scene visit by the Executive Officer

in the company of the County Surveyor, Tharaka Nithi County, and the parties' advocates. Orders were given accordingly.

18. On 20.12.2016, the parties were supposed to record a consent. However, Mr. Omari for the plaintiff told the court that Mr. Ndubi had incited the plaintiff and his cohorts to disobey court orders. Because of the apparent disagreements, the consent could not be recorded. Both parties, however, indicated that they would continue with their negotiations. On the same day, I ordered that File No. HCCC 235 of 1992 be annexed to this file. The defendant had claimed that this suit was **res judicata Meru HCCC 235 of 1992**.

19. The parties were directed to negotiate an out of court settlement with the assistance of the County Commissioner, Tharaka North.

20. On 16<sup>th</sup> January, 2017, the Deputy Registrar, Meru High Court, received a letter from the Defendant Modesto Njeru which was dated 10<sup>th</sup> January, 2017. This letter viciously attacked the person of the Judge handling this matter and made veritably wild and scurrilous allegations.

21. On 7.3.2013, Mr. Ndubi for the plaintiff told the court that he had, through his letter dated 24<sup>th</sup> February, 2017 admonished the plaintiff to desist "from writing such letters directed to court without our advice or else we will consider withdrawing from acting for you."

22. I do note that on at least 2 times, the plaintiff had demonstrated dishonourable conduct in court including on 30.5.2016 when the defendant had called Father Eliud Mwenda "Kichwa Ngumu" and opined that he deserved to die. The court cautioned him not to continue demonstrating such despicable behavior.

23. The issue of the ownership of the land disputed in this matter was definitively decided in Meru HCCC 235 of 1992. It was ordered that the church should remain with 82 acres and the defendants were to remain with 98.32 acres.

24. Whereas it is true, as the plaintiff claims, that this dispute concerns the burial of the defendant's deceased wife, a burial cannot take place in the air. It must be done on land. I opine that HCCC 235 of 1992 decided ownership of the disputed land.

25. The change of names in this suit to mean that it concerns Catholic Diocese of Meru (Mukothima Parish) whilst HCCC 235 OF 1992 concerned the Catholic Diocese of Meru and Gatunga Catholic Mission does not change the fact that the land in issue is the same land.

26. It is not claimed that the defendant was not one of the 54 defendants in Meru HCCC 235 of 1992.

27. As long as the plaintiff intends to bury his wife on his portion of the 98.2 acres the court found belonged to the defendants in Meru HCCC 235 of 1992, he is within his rights.

28. In as far as this suit is claiming ownership of that land in which the plaintiff seeks to bury his wife, and as long as the plaintiff does not bury her on any portion other than his share of the 98.2 acres the court found belonged to the defendants in Meru HCCC No.235 of 1992, this suit is Res Judicata HCCC No.235 of 1992.

29. In the circumstances, this application by the plaintiff dated 23<sup>rd</sup> November 2016, is allowed with the consequence that interim orders granted vide the plaintiff's application dated 17<sup>th</sup> May, 2016 are vacated.

30. Having found this suit Res Judicata Meru HCCC No.235 of 1992, this suit is dismissed.

31. Costs generally follow the event. But in view of the dishonourable conduct evinced by the defendant in these proceedings, parties will bear their own costs. Choices have consequences. One cannot scandalize

judicial officers and behave dishonourably in court without one's opprobrious shenanigans inviting deserved deprecation.

32. It is so ordered.

Delivered in open court at Chuka this 21<sup>st</sup> day of March, 2017 in the

presence of:

CA: Ndegwa

Father Eliud Mwenda for the plaintiff

Modesto Njeru - defendant

**P. M. NJORGE,**

**JUDGE.**