REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Civil Suit 132 of 2011

ERASTUS GITONGA MUTUMA…....……PLAINTIFF

VERSUS

MUTIA KANUNO .....1ST DEFENDANT

MICHAEL GICHUNGE ……..…….....…….2ND DEFENDANT

ZAKARY MUTUA …….....……..…….3RD DEFENDANT

KABWI M'ITUMBIRI ……..…....…….……4TH DEFENDANT

R U L I N G

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The applicant by an application dated 27th September, 2011 brought under Section 1A,1B,3A and 63(c) and (e) of Civil Procedure Act, and Order 40 Rule 1 of the Civil Procedure Rules 2010 seeks the following orders:-

1. That the application be certified extremely urgent and it be heard ex-parte in the first instance.

2. That pending inter-partes hearing of the application, a temporary injunction do issue, restraining the defendants, their successors, members, adherents, faithful, sympathizers, followers and anyone else acting or claiming for, through or on behalf of them or any of them, from summoning, compelling and/or subjecting the plaintiff/applicant to, and/or conducting any form of hearing of disputes over land against the plaintiff/applicant, and/or administering any form of oath to the plaintiff/applicant, on 01/10/2011 or any other subsequent date.

3. That pending inter-partes hearing and determination of the suit or until further court orders, a temporary injunction do issue, restraining the defendants, their successors, members, adherents, faithful, sympathizers, followers and anyone else acting or claiming for, through or on behalf of them or any of them, from summoning, compelling and/or subjecting the plaintiff/applicant to, and/or conducting any form of hearing of disputes over land against the plaintiff/applicant, and/or administering any form of oath to the plaintiff/applicant.

That on 28/09/2011 and 30/09/2011 prayers 1 and 2 of the application were dealt with, remaining with prayer 3 and 4 for inter-partes hearing.

The application is based on the grounds on the face of the Notice of Motion. The grounds relied upon are listed as follows:-

a. **THAT**the 1st, 2nd and 3rd respondents are the officials of Maua Division ***Njuri Ncheke*** Council of Elders.

b. **THAT** the applicant is not a Njuri adherent but the 4th respondent is.

c. **THAT** the respondents have ganged up, summoned the applicant and vowed to hear an alleged case over land lodged against him by the 4th respondent, which hearing includes administration of health-periling, dreadful and emotionally stressful and torturous oaths.

d. **THAT** the respondents have directed the applicant to pay Kshs.25,000/- ahead of the purported hearing and oath administration on 01.10.2011, after the first two attempts flopped.

e. **THAT** the respondents have obstinately vowed to proceed with the hearing on 01.10.2011 and curse and exorcise the applicant if he fails to attend and/or pay the demanded Kshs.25,000/=.

f. **THAT** the applicant is a civilized man and a firm Christian, whose pleas to have the 4th respondent's grievances against him referred to court or the adjudication officer have hit a snag.

g. **THAT** the applicant has not been informed the claims against him to enable him prepare to defend himself.

h. **THAT** the purported healing and oath administration is repugnant to justice and morality and against the rule of law and public order.

i. **THAT** the applicant'srisks vandalism of his properties and forcible eviction from his land.

The application is supported by applicant's affidavit dated 27th September, 2011 in which the applicant has stated as follows. That the 1st, 2nd, and 3rd defendants/respondents are respectively, the Chairman, Vice Chairman, and Secretary of Maua ***Njuri Ncheke*** Council of Elders, while the 4thdefendant/respondent is a Senior Veteran and an adherent of the said council but the applicant is not a member or follower of the said Council.

That on the two occasions in August and September, 2011, the 1st, 2nd and 3rd respondents in their capacities as officials of ***Njuri Ncheke*** Council of elders, summoned the applicant at the behest of the 4th respondent for hearing of a case lodged by the 4th respondent over applicant's parcel of land No.214 measuring about 2.6 acres, situated at Amwathi/Maua Adjudication Section which hearing includes administration of various oaths namely, **KITHIRI**, **NTHENGE** and **MUUMA**. That the applicant was supposed to pay mandatory fee of Kshs.250,000/= for hearing and oath taking but the applicant declined to pay.

That applicant was resummoned for purportedly hearing and oath on 01.10.2011 and the respondents

have obstinately demanded that applicant pay the nonnegotiable fees demanded before-hand. That the applicant stated that the respondents have vowed to proceed with their rituals whether applicant attended or not. The applicant attached copy of the summons marked "EGM1". The applicant has further stated that the 4th respondent has certainly compromised the co-respondents to deprive the applicant his aforesaid ancestral land and implant the 4th respondent thereto, yet the applicant stated he had inherited the land from his father, the late Jacob Mutuma M'Mbau in or about 1974. That the applicant has since 1974 been in actual possession of the same and applicant has developed the land. That he has 200 mature coffee plants, 4 mature loquat vines, Napier grass, over 70 mature miraa(khat) shrubs, about 200 semi-mature blue gum trees, 200 gravellia and indigenous trees like Mikarati, Mithanduku and Mituati. That the respondents have inexplicably disregarded the applicant's pleas to have the purported dispute referred to court of the Adjudication Office and vowed to proceed as intended:-

The applicant has deponed that he does not subscribe to practices, norms and customs of ***NJURI NCHEKE*** as he is civilized and born again Christian working at Kenidia Assurance Co. Ltd in Nairobi. That to date the applicant has stated that he has not been notified of the 4threspondent's allegations against him to enable him prepare defence. He has stated that ***Njuri Ncheke*** applies uncouth, barbaric, repugnant, apprehensive, intimidating, risky, health periling and unchristian practices, norms and customs like black-magic, curses, Kithiri oath, Nthenge oath and Muuma, an oath of receiving and swallowing saliva and a chewn piece of meat from the mouth of an elderly Njuri adherent who sniffs traditional tobacco, some of which is put in the inner side of the lower lip, which virtues the applicant has stated is unwilling to undergo. The applicant deponed that the practices are dehumanizing, emotionally stressing, traumatizing, stigmatizing and demeaning. The applicant has also deponed that he has gathered from elders who have defected from ***Njuri Ncheke*** that ***Njuri Ncheke*** claims self-given powers in view of its large number of adherents in the area, to forcibly evict a person from the land, destroying his properties, therein and implant therein the person they deem the winner of the cases they hear, especially if one fails to attend and/or pay their mandatory fees and/or refuses to undergo their foregoing rituals and that the applicant depones that he is reasonably apprehensive that unless the court intervenes urgently, he shall fall a victim. The applicant stated the intended ***Njuri Ncheke*** hearing and oath intended to be presided over by the respondents is repugnant to justice and morality and converse to the rule of law and public policy. That the applicant has deponed that the respondents intend to extort from him at least Kshs.25,000 in the pretext of collecting their purported and unjustified fees so as to reap where they had not sown.

The applicant has deponed that he is **********(12) the 4threspondent has already informed his co-respondents since they are birds of a feather and that is why 4th respondent does not want to refer any grievance he has against the applicant to court and on the Land Adjudication Office.

The 3rd respondent filed replying affidavit on its behalf, that of 1st and 2nd respondents. The 4th respondent filed his replying affidavit.

The 3rd respondent in his affidavit dated 13th October 2011 states as follows: That he is the Secretary of ***Njuri Ncheke ya Ameru*** Council of Elders Maua Division. That Njuri Council of Elders is a respected institution of the Ameru people and is not certainly the devious, archaic and barbaric organization that applicant has tried to paint in his application herein. That ***Njuri*** consists of all impeccable characters and will respect people of all faiths including Christians and Muslims and stated that he believed all are civilized.

That the major purpose of ***Njuri*** is to act as an informal arbitrator of disputes brought before it by Ameru people. He stated that the Council of Elders do not apply any uncouth, barbaric, archaic, repugnant, apprehensive, intimidating risky, unhealthy and un…….. practices, norms and customs as described by the applicant. The 3rd respondent stated that the 4th respondent lodged a complaint before the council and therefore summoned the applicant to a hearing on 6th August, 2011. the respondents denied demanding Kshs.25,000/- and challenged applicant to produce any proof. The respondents denied having vowed or threatened to curse or to exercise the applicant as alleged or ever having intended to conduct any oath whether Kithiri Oath, Nthenge Oath or Muuma or otherwise. The respondents stated the

allegation by the applicant arose from his imagination or what the ***Njuri Ncheke*** is all about. That respondents stated that whereas oaths were accepted method of resolving disputes by the Ameru people there are conditions such as at both people must agree to undergo the oath and as such the respondents have stated they cannot force the applicant to undergo oathing unless he voluntarily agrees.

That the 3 oaths the respondent stated are different or distinct and cannot be performed concurrently on the same issue or dispute. The respondents denied having been influenced by the 4th respondent as he is not an official of ***Njuri Ncheke*** Council of Elders. The respondents stated that they are Christians but of African extraction and that does not make them throw away their cultural norms which they contended could certainly be said to be repugnant. That the respondents stated the ***Njuri Ncheke*** Council of Elders hears even land disputes but their decision is an informed decision and is neither binding nor capable of being executed. The respondents stated that they do not stop any party from seeking redress in court.

The respondents deponed that they believed that the applicant has no grounds to seek orders herein but is after demonizing and painting the ***Njuri Ncheke*** in bad light without any iota of evidence. The respondents averred that they met in open day time at D.O's compound and they have nothing to hide at the time of hearing the dispute and/or oathing.

The 4th respondent in his replying affidavit dated 17th October, 2011 briefly stated as follows: he stated his name is John M'Itumbiri M'Maria and not Kabwi M'Itumbiri but admitted being served with court summons in this case. The 4th respondent stated that he never had any case with applicant in respect of land parcel No.214 Amwathi/Maua Adjudication Section whether before ***Njuri Ncheke*** or at all. The 4th respondent admitted being aware of applicant being summoned by ***Njuri Ncheke*** but stated the said summoning was not intended for anybody and that no fees was demanded. The 4th respondent has deponed that he is not aware of parcel of land No.214 Amwathi/Adjudication Section nor has there been any dispute over the land between the applicant and 4th respondent.

The 4th respondent averred that the applicant is aware of the 4th respondent's claim. He also averred that ***Njuri Ncheke*** is credited for its excellent contribution in alternative dispute resolution among the Ameru people from time immemorial. He has further deponed that once one is installed a ***Njuri Ncheke*** elder one cannot defect. The 4th respondent has averred that none of the ***Njuri Ncheke*** processes is repugnant to justice and/or morality. The 4th respondent had denied that he has influenced his co-respondents and/or ***Njuri Ncheke*** elders as alleged or at all.

The 4th respondent stated that originally he was the owner of land parcel No.207 Amwathi/Maua Adjudication Section which is part of his ancestral land measuring approximately 1.3 acres. That he is the one who gathered the land and the same registered under his name. that the 4th respondent deponed that he has been in possession of the same and has developed the same. That 4th respondent averred that in 1986 he fell sick and admitted and Nkubu Mission Hospital and the applicant entered the land without 4threspondent's knowledge and started interfering with 4th respondents developments.

That 4th respondent stated that when he learnt of applicant's illegal occupation of 4threspondents' land he sought to evict him. That when applicant cautioned the land and claimed it to be his, the 4th respondent decided that the matter be settled out of court through ***Njuri Ncheke*** since the applicant won't lie before ***Njuri Ncheke***. That 4th respondent had transferred the land to his daughter Seberia Makena. That applicant offered to attend the proceedings before ***Njuri Ncheke*** but failed on two occasions. The 4th respondent has averred that no one can be forced to attend the ***Njuri Ncheke*** proceedings for it is just but one of the ways of ********(25) of alternative dispute resolution where especially mediation and negotiation are used. That 4th respondent has averred that a Nthenge Oath or Kithiri can only be preferred when deadlock is reached in mediation and negotiation.

The 4th respondent has deponed that the fear or hesitation of attending proceedings before the ***Njuri Ncheke*** through which a liar can be ascertained since if the opposition were correct there would be no

cause for fearing. The 4th respondent has in his affidavit stated that even in court he is ready, capable and willing to prove that the said land is his and the applicant is in occupation thereby illegally, wrongfully and unjustly. The 4th respondent has further averred the applicant's application is unnecessary for no one can be forced to attend the ***Njuri Ncheke*** proceedings and that the orders of this court should not be issued in vain.

The applicant in his supplementary affidavit dated 24th October, 2011 stated that the 1st, 2nd, and 4th respondents vowed to force applicant to undergo their repugnant oaths to intimidate and humiliate the applicant and they had been compromised by the 4th respondent who is their member, so then the 4th respondent could be favoured in the purported hearing. He has further averred that if the 1st, 2nd and 3rd respondents are reasonable persons as they feign, they ought to have advised the 4th respondent to seek redress in court if the 4th respondent had any genuine grievance against the applicant. The applicant averred that the 4th respondent is commonly and publicly called KABWI M'ITUMBIRI. The applicant has deponed that he has not lied and the case before court is not about land but about purported and illegal hearing and oaths administration over a disputed not disclosed to the applicant. The applicant has deponed that a fees of Kshs.25,000/= was demanded from him and advised to pay any of the officials of the ***Njuri Ncheke***. The applicant denied having occupied the 4threspondent's land otherwise he would have been sued. The applicant denied having offered to attend ***Njuri Ncheke*** hearing. The applicant stated that he is fearing nothing and that is why he filed this case to protect himself against aggression by a body not recognized in law. That the respondent by summoning the applicant has averred is forcing the applicant to attend the respondent's purported hearing/oath administration. The applicant has stated that the 4th respondent is free to sue the applicant in court if the applicant is occupying the 4threspondent's land.

The counsel for both applicant and respondents put written submissions. The applicant's counsel written submissions are dated 16th December, 2011 whereas the respondent's counsel submissions are dated 16th December, 2011.

The learned counsel for the applicant addressed court on his submissions. The Counsel's submissions are more or less as per the applicant's affidavits. The counsel submitted that ***Njuri Ncheke*** has no jurisdiction to determine an issue over land in an adjudication Section. He referred me to Section 4-13 of the Land Adjudication Act(Cap.284).

He submitted such power is granted to Adjudication Committee, Arbitration Board, Land Adjudication Officer and Minister and Courts of Law in light of Section 8 Cap 283 which provides:-

"8. (1) Subject to the provisions of this section, no person shall institute and no court whatever shall take cognizance of, or proceed with or continue to hear and determine, any proceedings in which the ownership or the existence under native law and custom of any right or interest whatsoever in, to or over any land in an adjudication area is called in question or is alleged to be in dispute unless the prior consent in writing of the Adjudication Officer to the institution or continuance of such proceedings has been given. And also in light of Section 3 of the Land Adjudication Act (Cap.284)

3. (1) The Minister may by order apply this Act to any area of

Trust land if—

(a) the county council in whom the land is vested so requests;

and

(b) the Minister considers it expedient that the rights and

interests of persons in the land should be ascertained and

registered; and

(c) the Land Consolidation Act does not apply to the area:

Provided that this Act may be applied to an area to which the Land Consolidation Act applies where a record of existing rights has not been completed and certified under section 16 of that Act, and in such case, where anything has been done in the course of or for the purpose of adjudication under that Act, the Minister, if he is satisfied that those

things have been done substantially in accordance with the principles of this Act, may, by order, order that those things shall be deemed to have been done under the corresponding provisions of this Act.

(2) An order under this section shall define the area to which it

relates either by description or by reference to a plan or both.

The counsel for applicant submitted further that the administration of oaths by ***Njuri Ncheke*** Council of Elders is repugnant to justice and morality and is against the Constitution of Kenya in light of Article 159(3) of the Constitution because the applicant is not a member of the ***Njuri Ncheke*** and does not subscribe to the practice of the respondents. The council submitted that the applicant has satisfied the conditions for granting an order of injunction against the respondents.

The respondent's council in his written submissions relied on the replying affidavits sworn by the respondents. The council submitted that the application brought under the wrong order, by order 40 rule 1 of Civil Procedure Rules and fatally defective.

That the application did not meet the principles set out in the celebrated case of **Giella– VS- Cassman Brown & Co. Ltd(1973) EA 358.** the learned Counsel submitted that the respondent is a respected, credible, transparent and just Counsel of Elders of Ameru People that applies traditional as well as modern mechanical forms of dispute resolution that are constitutionally recognized under Article 159(2) of the Constitution of Kenya.

The learned Counsel submitted that ***Njuri Ncheke*** elders operate through receiving complaints from the public, then summons the relevant parties and then apply there mechanism in settling dispute. That should any party refuse to comply with summons; the elders refer the other party to a court of law. That referral to court is also done when any party withdraws its submissions to the elders at any stage of proceedings.

He submitted the services by ***Njuri Ncheke*** elders are without any monetary fees. That in cases of deadlock in case before ***Njuri Ncheke*** there are mechanisms of breaking such a deadlock, and in cases of ***Njuri Ncheke*** such mechanisms are performance of Kithiri curse of Nthenge oath. The counsel further submitted that with reference to this case, since applicant chose not to (28 4last para) the summons dated 1st October, 2011, the ***Njuri Ncheke*** Elders cannot and will not proceed with the matter and the matter can only be heard by a court of law. He submitted granting the prayers will be totally in vain since the same will be preventing something that all parties **(39) knows it will not occur. He submitted the applicant should not be allowed to satisfy his ego by granting orders in vain. The learned Counsel further submitted should the orders prayed be issued, the same would amount to suppressing traditional dispute resolution mechanism because the suit is meant to harass, embarrass and intimidate the respondents rather than deal with the real*****(40) problem. The learned Counsel submitted that no interim orders were made with regard to applicant's prayer No.2 yet the alleged oaths did not occur.

The counsel for the respondents submitted that no interim orders were made with regard to applicant's prayer No.2 yet the alleged oath did not occur. A quick glance at courts record shows that on 30/09/2011 prayer No.2 being unopposed by the respondents who were present was granted by court. The alleged oath therefore cannot be said it did not occur because no interim orders were granted. There were and there are interim orders in force and that could explain now why hearing and oath administration has not taken place.

The application is challenged as fatally defective for having been brought under the wrong order, that is to say Order 40 rule 1 of Civil Procedure Rules instead of Order 40 Rule 2 of the Civil Procedure Rules.

Under Order 51 rule 10 (1) and (2) of the Civil Procedure Rules it is provided:-

"10. (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."

In view of the provisions of Order 51 Rule 10(1) of Civil Procedure Rules quoting wrong order is not fatal as no application should be refused merely by reason of a failure to quote the right order, or rule or other statutory provision.

The right order under which this application ought to have been quoted is Order 40 Rule 2(1) of Civil Procedure Rules which provides:-

"2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from

committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

Under Article 159(1) of the Constitution of Kenya it is provided:-

"159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution."

The above mentioned Articles clearly spells out that it is only courts and tribunals established by court under the Constitution of Kenya which are vested with Judicial Authority. ***Njuri Ncheke*** is not a court nor a tribunal established under the Constitution of Kenya nor is it vested into Judicial authority and court purport to exercise Judicial authority.

Under Article 159(2) (c) of the Constitution of Kenya it is provided:-

"(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional disputeresolution mechanisms shall be promoted, subject to clause(3);"

Under Article 159(3) of the Constitution of Kenya it is provided:-

"(3) Traditional dispute resolution mechanisms shall not be used in a way that—

(a) contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law."

The applicant submitted that ***Njuri Ncheke*** applies uncouth, barbaric, archaic, repugnant, oppressive, intimidating, high health-periling and unchristian practices. That hearing and oath taking by the ***Njuri Ncheke*** is repugnant to justice and morality.

The Constitution is clear that traditional dispute resolution mechanism shall not be used in a way that contravenes the Bill of Rights or if it is repugnant to justice and morality or result in outcomes that are repugnant to justice or morality or is inconsistent with the Constitution or any written law.

Article 29(d) of the Constitution provides:-

"29. Every person has the right to freedom and security of the person, which includes the right not to be—

(d) subjected to torture in any manner, whether physical or psychological;

Article 32(1), (2),(3) and (4) of the Constitution of Kenya provides:-

32. (1) Every person has the right to freedom of conscience,religion, thought, belief and opinion.

(2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.

(3) A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.

(4) A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion."

The applicant herein is a Christian and it has been submitted that taking oath before ***Njuri Ncheke*** would be against his freedom of conscience, religion, thought, belief and opinion. That by taking oath before ***Njuri Ncheke*** would amount to violating or infringing his right or fundamental freedom in the Bill of rights.

In view of the foregoing the traditional dispute resolution mechanism, by ***Njuri Ncheke***, would be contravening applicants Bill of Rights and would be inconsistent with the Constitution or written law.

Article 50(1) of the Constitution of Kenya provides:-

"50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

The applicant has deponed that he won't have a fair hearing before the ***Njuri Ncheke*** and the dispute won't be resolved by the application of law.

In case of ***Ndeto Kimomo – VS- Kavoi Musumba(1977) KLR 170*** Law V.P stated:-

"In my view, when the parties agreed to have their case decided by taking of an oath, they were in effect withdrawing the appeal from the High Court's jurisdiction and invoking another jurisdiction, involving procedures such as slaughtering a goat, beyond the control of the High Court. The parties were of course entitled to have their case decided in any lawful way they wished, by consent. For instance, to take an extreme and improbable example, it would be open to the parties to an appeal to say to the Judge "we have decided that this appeal is to be decided by the toss of a coin." The Judge would surely say: " In that case, you must either withdraw this appeal, or come before me in due course with a consent order that the appeal be allowed or dismissed." It would be wrong in principle, in my view, for the Judge to adjudicate on whether the coin had been properly tossed or not, and to decide the appeal on that basis. Where procedures unknown to the rules governing the hearing and disposing of appeal are applied by the consent of parties to an appeal, the courts should not in my view participate in those procedures, or dispose of an appeal according to the result of those procedures, in

the absence of a clear and unambiguous agreement as to that result on which a consent decree can be based. In my view the proceedings in this appeal since the filing of the consent order on 5th October, 1973 have been a nullity involving, as they do, the application of two separate jurisdictions to the same appeal. For this sorry state of affairs the parties and their then advocates are in my view primarily responsible. I would allow this appeal, so that the judgment of the High Court can be set aside. I would declare that all the proceedings in the High Court since October, 1973 are null and void. I would order that the parties bear their own costs from that date, including the costs of this appeal. It is open to first defendant, if he so wishes, to proceed with this appeal in the normal way, and have it adjudicated on the merits. I express the hope, however, that the parties will now agree to withdraw the appeal to the High Court and to have their dispute resolved under the Land Adjudication Act."

In case of **M'Ikiara – VS- M'Ikiandi(1984) KLR 170** Kneller JA stated

" There are provisions in the Constitution of Kenya, which militate against this procedure. Section 77(9) and (10) prescribe that:

"(9) A court or other adjudicating authority prescribed by law for the determination of the existent or extent of a civil obligation, shall be established by law and shall be independent and impartial; and where the proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing, within a reasonable time.

"(10) Except with the agreement of all parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public."

The oath administrator, though still a valued respectable member of the community in some areas, is not a court or an adjudicating authority, established by law to determine the existence or extent of any civil right or obligation. The respondent in this appeal, instituted his proceedings in the High Court and thereafter he and the appellant, were entitled to a fair hearing(and decision) within a reasonable time and all this, should have taken place in public. If they wanted their dispute resolved by the oath administrator, they should not have begun or continued it in a court established by law. There are, however, some proceedings which can be referred to another place e.g. arbitration, under the Civil Procedure Act(Cap.21) Order XLV of the Civil Procedure Rules and the Arbitration Act(Cap.49), but these are prescribed by law for such determination."

The test for granting an interlocutory injunction are well settled. They are set out in the after cited case of **Giella V Cassman Brown & CO(1973) EA.358.**

The Counsel for the respondents referred me to case of **CUT TOBACCO KENYA LTD – VS – BRITISH AMERICAN TOBACCO(K) LTD(2001) KLR 36** in which Court of Appeal stated:-

"Another correct approach to an application for injunctionis that applied by the predecessor of this Court in the caseof GIELLA VS CASSMAN BROWN & CO. LTD [1973] EA 358 where Spry V.P. in the leading Judgment of the Court stated at p.360:

"I will begin by stating briefly the law as I understand it. First, the granting of an interiminjunction is an exercise of judicial discretion and an appellate court will not interfere unless it be shown that the discretion has not been

exercised judicially (Sergeant Vs. Patel (1949], 16 EACA 63).

The conditions for the grants of an interlocutory injunction are now, I think well settled in EastAfrica. First an applicant must show a prima facie case with a probability of success.

Secondly, an interlocutory injunction on will not normally be granted unless the applicant

mightotherwise suffer irreparable injury which would

not adequately be compensated by an award of damages. Thirdly, if the Court is in doubts, it will decide an application on the balance of convenience."

The respondent's Counsel also referred me to case of **National Bank of Kenya Ltd – V – Samson……Ltd(2003) KLR 462** in which Court of Appeal stated:-

"With respect, we think this is an arguable point in the intended appeal. The conditions for the granting of an interlocutory injunction are now, we think, well settled. In Giella v Cassman Brown & Co Ltd [1973] EA 358 at pg. 360, it was stated as follows:"First, an applicant must show a prima facie case with

a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (EA Industries v Trufoods, [1972] EA 420.)"

Furthermore, the learned judge considered other circumstances on an equitable basis and the balance of convenience. He held:"The court however acknowledges that the plaintiff has come to it praying for the discretionary and prerogativerelief of injunction – an equitable remedy. The courtwill consider and grant or refuse such a remedy after carefully considering all the circumstances obtaining including the conduct of the parties and especially the applicant. The interests and rights of the respondent shall not be overlooked or ignored in any way. This beckons the balance of convenience to come into play……".

The counsel for the applicant on his part referred me to the case of **Giella –V- Cassman Brown & Co. Ltd(1973) EA 358** in which Court of Appeal for Eastern Africa set out the principles under which injunction can be granted as follows:-

The applicant has shown that he has a prima facie case with probability of success. There is no dispute that the 4th respondent lodged a complaint with 1st, 2nd, and 4th respondent against the applicant. The 1st, 2nd and 3rdrespondent's officials of ***Njuri Ncheke*** Council of Elders which amongst other things assists in resolving disputes amongst its Ameru members. The Constitution of Kenya under Article 159(2) (c) recognizes alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism subject Clause 3 of Article 159(3) of the Constitution.

The Constitution forbids traditional dispute resolution mechanisms which is used in a way that contravenes the Bill of Rights or is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality as is inconsistent with this Constitution or any matter of law whereas ***Njuri Ncheke*** Council of Elders can take part in Traditional Dispute Resolution its hearing and determination of any dispute is subject to Article 159(3) of the Constitution.

I have not found evidence from affidavits of both parties that the ***Njuri Ncheke*** Council practices are uncouth, barbaric, archaic, repugnant, oppressive, intimating, unhealthy and unchristian. The ***Njuri Ncheke*** council of elders receives complaints and summons parties who can choose to submit to their jurisdiction or not. The parties have to consent to submit before ***Njuri Ncheke*** council. This is admitted by respondents in their affidavits. That once a party refuses to submit to ***Njuri Ncheke*** council of elders the council is supposed to refer the complainant to court of law.

In this instance case the applicant has refused to submit to the council of elders, who have admitted that they cannot force a party to have a matter against him heard by council. The council knows very well that they lack jurisdiction, as per provisions of law have to date not referred the 4th applicant to file his claim in court of law. The applicant Bill of Rights is threatened to be violated or infringed or denied if

applicants right to freedom of conscience, religion, thought, belief and opinion is not protected as per provisions of the Constitution of Kenya.

The applicant may be subjected to **KITHIRI** oath or **NTHENGE** oath or **MUUMA**.

I therefore find that the applicant has demonstrated that he has a prima facie case with reasonable probability of ultimately succeeding upon trial.

The applicant in his affidavit has stated that the ***Njuri Ncheke*** practices are dehumanizing, emotionally stressing, traumatizing, stigmatizing and demeaning.

That their decision are not based on proper application of law and are not fair and that one is forced to under ***Njuri Ncheke*** rituals which are against the applicant's conscience, religion, thought, belief and opinion.

The applicant averred that if injunction is not granted he stands to suffer loss or damage of such a nature and magnitude that damages will not adequately compensate the applicant. I find that the damages cannot adequately compensate the applicant for loss or damage that he may suffer if injunction is refused. The emotional stress, trauma, stigma, unfair trial and loss of self-esteem that applicant may suffer if injunction is refused cannot be adequately compensated by way of damages.

Lastly the comparative mischief likely to result to the applicant should the injunction be refused outweighs that which result to the respondents should it be granted. The balance of convenience tilts in favour of the applicant.

In the circumstances, the application is granted and I make the following orders:-

1. That pending hearing and determination of this suit or until further court orders, a temporary injunction be and is hereby issued restraining the defendants, their successors, members, adherents, faithful's, sympathizers, followers and anyone else acting or claiming for, through or on behalf of the defendants or any of the defendants, from summoning, compelling and/or subjecting the plaintiff/applicant to, and/or conducting any form of hearing of disputes over land No.214 Amwathi/Maua Adjudication Section against the plaintiff/applicant and/or administering any form of oath to the plaintiff/applicant.

2. That costs of the application to the applicant.

DATED, DELIVERED AND SIGNED AT MERU THIS 26TH DAY OF MARCH, 2012

J. A. MAKAU
JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

1. Mr. Otieno C. h/b Mbaabu for the applicant

2. Mr. Nyenyire for defendant

J. A. MAKAU
JUDGE