



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Environmental & Land Case 55 of 2011**

**IN THE MATTER OF SECTION 128 (1) AND IX (1) OF THE REGISTERED LAND ACT CAP  
300 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ORDER 1 RULE 10(2) OF THE CIVIL PROCEDURE ACT CAP 21  
LAWS OF KENYA**

**ORDER 36 RULES 1&2, ORDER 39 RULES 1, 2 & 3 AND ORDER 40 RULES 1, 2, & 3 OF THE  
CIVIL PROCEDURE RULES AND IN THE MATTER OF LAND NO.SOUTH  
MARAGOLI/BUYONGA/847/1658**

**BETWEEN**

**DANIEL WAKOLO TIENGO t/a METRO COLLEGE OF EASTERN**

**AND SOUTHERN AFRICA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**GEORGE MUKIZA MUDANYA**

**t/a MUDASA ACADEMY.....DEFENDANT/APPLICANT**

**RULING**

On 3/3/2010 the Plaintiff filed this originating summons under section 128 of the Registered Land Act (Cap.300) and Order 36 rules 1 and 2 of the Civil Procedure Rules for the determination of the issues that land parcel no. South Maragoli/Buyonga/1658 belongs to Florence Jatiaga Tiego (the Plaintiff's mother); that the Defendant who is a neighbour has fraudulently and illegally annexed the land and become registered as proprietor; that the Land Registrar be ordered to restrict any dealings in the land; and, that there be an injunction restraining the Defendant, and all those acting under him, from interfering with the suit land.

In the affidavit sworn to support the suit, the Plaintiff swore that he was the son of Florence Jatiaga Tiego who was the owner of the land and who in 2002 left for the United States of America leaving him occupying the land. The mother had constructed a permanent and semi-permanent houses on the land and he was left to live in one. In 2006 the Defendant had made a claim to the land and had come on it and cut trees growing thereon. He had subsequently evicted the Plaintiff from the land and demolished the semi-permanent house on it. He had since denied the Plaintiff and his family access to the land. The

Plaintiff had intended to erect a college on the same.

On 20/3/2010 the Defendant filed a chamber application under sections 3A and 63 (e) of the Civil Procedure Act and Orders 6 rule 13, 7 rule 4 and 39 rule 12 of the Civil Procedure Rules for a temporary injunction and that the suit be struck out and or dismissed for being *res judicata* in view of Vihiga SRM CC no.85 of 2008 and for not disclosing a reasonable cause of action. In the indicated civil suit the matter had been brought by the Plaintiff over the same parcel of land and the same had been struck out with costs. It was observed, among other things, that the Plaintiff had sued over the suit land which was registered in the name of his mother Florence Tiego whom he had not made a party to the proceedings, and that he had no proprietary interest in the land. It was also clear that on suit land was Mudasa Academy.

On 22/7/2010 Justice Lenaola granted the application in its prayers 3 and 4 as the same had not been opposed. It means that the suit was struck out and/or dismissed with costs.

On 27/6/2011 the Plaintiff filed a motion under Orders 3 A and 63 (e) of the Civil Procedure Act and Orders 6 rules 1 and 3 (1) and 40 rules 1, 2 and 3 (1) of the Civil Procedure Act for the orders that the court suspends permanently the orders of Justice Lenaola, a temporary injunction does issue against the Defendant and the Defendant produces the titles to parcels nos South Maragoli/Buyonga/847 and 1658. On 15/8/2011 the Defendant filed the present motion under sections 1A, B, C and 3A of the Civil Procedure Act and Order 2 rule 15 of the Civil Procedure Rules seeking that the undated and unsigned motion of the Plaintiff (the application above) and all the documents accompanying it be struck out and/or expunged from the court record. There were several grounds but the main one was that the suit had not been reinstated and therefore the Plaintiff could not bring the application. The Plaintiff's response was that the application had both been signed and dated and was therefore competent; that he was the *bonafide* son of the registered owner and this was ancestral land; and that his application became necessary because the suit had been bungled by his advocate who had been compromised by the Defendant. His case was that his suit raised substantial issues which required adjudication.

As matters stand, the Plaintiff's suit was on 22/7/2010 struck out and/or dismissed with costs. The Plaintiff would have no basis to make an application in such a matter as it no longer exists. He is at liberty to seek the setting aside of the order so that he can be allowed to defend the application that resulted into the same. Until the suit is reinstated there is no basis for the application dated 27/6/2011. The application is not competent and is struck out with costs. I hasten to add, however, that the application was both signed and dated.

Dated, signed and delivered at Bungoma this 22<sup>nd</sup> day of October, 2012.

**A. O. MUCHELULE**  
**JUDGE**