



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO 04 OF 2020

ELIAS MICHENI MUGO.....PLAINTIFF

VERSUS

KENYA URBAN ROADS AUTHORITY (KURA).....1ST DEFENDANT

THE ADMINISTRATOR CHUKA TOWNSHIP.....2ND DEFENDANT

THE COUNTY GOVERNMENT OF THARAKA NITHI.....3RD DEFENDANT

HYPER CONSTRUCTIONS AND EQUIPMENTS COMPANY LIMITED.....4TH DEFENDANT

RACHAEL NJERI NDOHO.....5TH DEFENDANT

THE HONORABLE ATTORNEY GENERAL.....6TH DEFENDANT

RULING

1. Two applications are the subject of this ruling.

2. The amended Notice of Motion in this matter is dated 1st October, 2020 and seeks orders:

1. That for reasons set out in the certificate of urgency herewith filed the court be pleased to certify the instant application as urgent and do issue prayer 2 and 4 herein on exparte basis.

2. That pending the hearing interpartes of this application the respondent by themselves they (sic) agent or servants or any person acting at their behest be restrain (sic) by way of interim injunction from constructing "moi girls road" or any other road within chuka township in as much that such construction of "moi girls road" or any other road within chuka township affect plot no.26 A 2 chuka township which measures 60 feet by 20 feet.

2(a) That pending the hearing interpartes of this application the respondent by themselves they (sic) agent or servants or any person acting at their behest be restrain (sic) by way of an interim injunction from constructing "moi girls road" or any other road within chuka township in as much that such construction of "moi girls road" or any other road within chuka township affect (sic) plot no.M26 A II(PARCEL NO.227) chuka township which measures 60 feet by 20 feet.

3. That pending the hearing of the main suit herein the respondent by themselves they (sic) agent or servants or any person acting at their behest be restrain (sic) by way of an interim injunction from constructing "moi girls road" or any other road within chuka township in as much as such construction of "moi girls road "or any other road within chuka township affect (sic) plot no.26 A2 chuka township which measures 20 feet by 60 feet.

3(a) That pending the hearing of the main suit herein the respondent by themselves they (sic) agent or servants or any person acting at their behest be restrain (sic) by way of an interim injunction from constructing "moi girls road" or any other road within chuka township in as much as such construction of "moi girls road "or any other road within chuka township affect (sic) plot no. M 26 A II(PARCEL no.227) chuka township which measures 20 feet by 60 feet.

4. That pending interparties hearing of the instant application , the district surveyor meru south/maara sub counties be ordered by

this honorable court to establish and determine the actual boundaries and perimeters of "MOI GIRLS" road vis-à-vis PLOT NO 26 A 2 CHUKA TOWNSHIP situated in chuka town and the survey be conducted as per the existing national map regarding CHUKA TOWN ROADS AND PLOTS and a report be filed in court within 30 days of this order.

4(a) That pending interparties hearing of the instant application, the district surveyor Meru South/Maara Sub Counties be ordered by this honorable court to establish and determine the actual boundaries and perimeters of "MOI GIRLS" road vis-à-vis PLOT NO . M26 A II(parcel no.227) CHUKA TOWNSHIP situated in chuka town and the survey be conducted as per the existing national map regarding CHUKA TOWN ROADS AND PLOTS and a report be filed in court within 30 days of this order.

5. That these orders be served upon the OCS Chuka Police Station for compliance

6. Cost of this application be provided for.

3. The application has the following grounds: (pasted as availed):

a. The applicant is the owner of plot no.26 A 2 Chuka Township.

A(1) The applicant is the owner of plot no.M26 A II (Parcel no.227) Chuka Township

b. That Plot No.26 A 2 (which is half of plot no.26 A Chuka Township) measures 20 feet by 60 feet as per the document held by the director of survey RUARAKA IN NAIROBI

b(1) That Plot No.M26 A II(Parcel no.227) (which is half of plot no.M26 A(Parcel no.227) Chuka Township) measures 20 feet by 60 feet as per the document held by the director of survey RUARAKA IN NAIROBI

c. That the applicant has been paying land rates to the 2nd and 3rd respondent without fail.

d. That on 18th February 2020 D. NDERITU an agent of the 1st respondent issued a notice that 20 feet by 20 feet portion part of plot no. 26 A 2 chuka township be demolished.

d(1) That on 18th February 2020 D. NDERITU an agent of the 1st respondent issued a notice that 20 feet by 20 feet portion part of plot no. M26 A II(PARCEL NO.227) chuka township be demolished.

e. That the 1st respondent contention was and his that 20 feet by 20 feet portion part of plot no.26 A2 chuka township is on the road reserve.

e (1) That the 1st respondent contention was and still is that 20 feet by 20 feet portion part of plot no.M26 A II(Parcel no. 227) chuka township is on the road reserve

f. That the applicant contention is that plot no.26 A2 chuka township or any part there of is not on the road and or road reserve.

f(1) that the applicant contention is that plot no.M26 AII(Parcel no. 227) chuka township or any part there of is not on the road and or road reserve.

g. The bond of contention between the applicant and respondent is therefore whether plot no.26 A or part there of is on the road or road reserve, hence the need to call a surveyor to establish the boundaries and the parameters of plot no.26 A 2 chuka township vis-a-vis "moi girls road".

g(I) the bond of contention between the applicant and respondent is therefore whether plot no. M26 A II (parcel no.227) or part there of is on the road or road reserve, hence the need to call a surveyor to establish the boundaries and the parameters of plot no.M26 A II (Parcel no.227) chuka township vis-a-vis "moi girls road"

h. The applicant further contends that there is a 11 meter wide space for roads construction but the respondent have tended to ignore this facts and insisting that plot no.26 A 2chuka township is on the road reserve .

h(148) The applicant further contends that there is a 11 meter wide space for roads construction but the respondent have tended to ignore this facts and insisting that plot no.M26 A II (Parcel no.227)chuka township is on the road reserve

i. That on 4th April 2020, the 5th and 4th respondent at the instance of the 1st respondent demolished, damaged and destroyed 20 feet by 20 feet portion part of plot no.26 A 2 chuka township.

I(i) That on 4th April 2020, the 5th and 4th respondent at the instance of the 1st respondent demolished, damaged and destroyed 20 feet by 20 feet portion part of plot no.M26 A II(Parcel no.227) chuka township the property of the plaintiff applicant herein.

j. That Roma Valuers Estimated the loss and damage suffered by the applicant to be ksh, 7,993,253.60

k. That there is need to know who has between the applicant and the respondent is on the wrong and this can only be confirmed by the district surveyor.

l. That the applicant has not been compensated consequently the respondent should be restrained by way of an interim injunction from constructing "Moi Girls road" or any other road within chuka town ship that may affect Plot No.26 a 2 chuka township or part there of .

L(i) that the applicant has not been compensated consequently the respondent should be restrained by way of an interim injunction from constructing "Moi Girls road" or any other road within chuka town ship that will affect Plot No. M26 a II(Parcel no.227) chuka township or part there of.

m. That the 1st respondent did not follow the law and procedure in "acquiring" 20 feet by 20 feet portion part of Plot No.26 a 2 Chuka Township and neither did they follow the law and procedure of demolishing 20 feet by 20 feet portion part of Plot No.26 A 2 Chuka Township.

M (i) that the 1st respondent did not follow the law and procedure in "acquiring" 20 feet by 20 feet portion part of Plot No. m26 a II(parcel no.227) Chuka Township and neither did they follow the law and procedure of demolishing 20 feet by 20 feet portion part of Plot No. m26 A II (parcel no.227) Chuka Township.

n. That there is need to have the actual parameters of plot no.26 A 2 chuka township established pending the hearing and determination of the main suit herein to facilitate the hearing and determination of the instant application and the main suit.

n (i) that there is need to have the actual parameters of plot no.M26 A II(parcel no.227) chuka township established pending the hearing and determination of the main suit herein to facilitate the hearing and determination of the instant application and the main suit.

o. That the orders of this court should be served upon OCS Chuka police station for compliance.

DATED AT CHUKA THIS20THDAY OFMAY.....2020

AMEDED AT CHUKA THIS.....1STDAY OF ...OCTOBER,....2020

4. The application is supported by the affidavit of **Elias Micheni Mugo**, the Plaintiff/Applicant sworn on **1st October, 2020** which states:

SUPPORTING AFFIDAVIT (pasted as availed)

I, ELIAS MICHENI MUGO OF P.O BOX 458 CHUKA in the republic of Kenya make oath and states as follows.

1. That I am the applicant herein well versed with the particulars of this suit and hence competent to make this oath.
2. That I make this oath in support of my amended notice of motion dated 20th May 2020 and amended on 1st October 2020.
3. That On or around 1956 the late JAPHET NJIRU and the late RICHARD GAKUURI were allocated plot no.26 Chuka Township.
4. That in 1994 upon municipal council of Chuka the predecessor of the 2nd defendant respondent herein coming into operation plot no 26 was renumbered to plot no.m26 Chuka township.(***annexed and marked E.M.M 1 is the letter of allotment of plot no.m26***).
5. That prefix M before plot no.26 meant "marigiti".
6. That upon the director of survey ,surveying Chuka town and coordinate of each plot fixed plot no.m26 was given parcel no.227.(***annexed and marked E.M.M 2 is PDP from department of survey***).
7. That plot no.M26 as per the record of the 1st defendant respondent and parcel no.227 as per the record of the director of survey refer to one and the same property and it measures 120 feet by 40 feet.
8. That under the letters of administration issued to REBECCA NJIRU upon the demise of JAPHET NJIRU plot no.m26 (parcel no.227) chuka township was divided and shared out to the late REBECCA NJIRU and the late RICHARD GAKUURI so that REBECCA NJIRU retained m26b (parcel no.227)while the late RICHARD GAKUURI retained m26 A. (parcel no.227)(***annexed and marked E.M.M 3 is the grant issued to REBECCA NJIRU***)
9. That upon the demise of JAPHET NJIRU ,REBECCA NJIRU the wife of the late JAPHET NJIRU petitioned court for letters of administration vide Embu SRM succession cause no. 45 of 1986 whereby the said REBECCA NJIRU and the late

RICHARD GAKUURI shared plot no.m26 equally as a result of which RICHARD GAKUURI retained M26A(parcel no.227) while REBECCA NJIRU retained m26b . ***(parcel no.227)(annexed and marked E.M.M3 is the grant issued to REBECCA NJIRU).***

10. That during the lifetime of RICHARD GAKUURI, I and the said RICHARD GAKUURI entered into a sale of plot agreement whereby the said RICHARD GAKUURI sold to me the rear half of plot no.m26a (PARCEL NO.227). ***(annexed and marked E.M.M4 is the sale of plot agreement)***.

11. That in 1st February 1996 the late RICHARD GAKUURI applied to the then municipal council of chuka the predecessor of the 2nd defendant herein to have his plot m26a (parcel no.227) subdivided into m26a(1) and m 26 a(II) parcel no.227 and which application was approved by the then municipal council of chuka. ***(annexed and marked E.M.M5 is the application for subdivision of m26a).***

12. That on 15th May 1994 RICHARD GAKUURI wrote to the town clerk of the municipal council of chuka authorizing the transfer of the rear half of plot no.m26a.(***(annexed and marked E.M.M6 is letter from RICHARD GAKUURI to the municipal council).***

13. That the then municipal council of chuka the predecessor of the 2nd defendant approved the transfer of the rear half of plot no.m26 a to me where upon the municipal council wrote to the commissioner of lands confirming the approval of the subdivision and transfer of plot no.m26 a II by the late RICHARD GAKURI to me.***(annexed and marked E.M.M7 is the transfer of plot no.M26 a II Parcel no.227).***

14. That the portion that was sold to me and transferred by RICHARD GAKUURI was 60 feet by 20 feet and which plot I constructed two stored building with a basement(***(annexed and marked E.M.M8 is the photographs showing the demolished building).***

15. That in light of the matters that I have deposed herein above I am the owner of plot no M26 A II(parcel no.227) although the leases have not been issued to the successors of the late JAPHET NJIRU and the late RICHARD GAKUURI (the process is at an advanced stage).

16. That the then municipal council of chuka the predecessor of the 1st defendant and the district physical planner and town clerk had approved the building plan of my storied building which was demolished by the 4th and 5th defendants at the instant of the 1st defendant . ***(annexed and marked E.M.M9 is the approved plan of the building demolished).***

17. That FRANKLIN JAPHET NJIRU the owner of plot no.m26b (parcel no.227) is in the process of having the certificate of lease of plot no.m26(parcel no.227) issued and the process is at advanced stage and I can aver for sure that by the time the main suit comes for hearing the said FRANKLINE JAPHET will be having the certificate of lease of m26 (parcel no.227) from which plot no.m26 b and plot no m26a(I) and m26 a II were excised.

18. That from the time I got registered with plot no.m26A(II) (parcel no 227) chuka town ship I have been paying rates to the 2nd defendant.(***annexed and marked E.M.M 10 is a buddle of land rates payment receipt).***

19. That I had fully developed plot no.m26A(II) (parcel no.227 chuka township and it measures 60 feet by 20 feet according to the record held by director of survey and the 2nd defendant. ***see annexure 2 above.***

20. That on 18th February 2020 D NDERITU an agent of the 1st respondent issued a notice that 20 feet by 20 feet portion part of plot no.m26 A(II) chuka township be demolished to pave way for road construction by the 1st defendant ***(annexed and marked E.M.M 12 is the notice of demolition letter by D.NDERITU an agent of the 1st defendant).***

21. That the 1st respondent contention was and his that 20 feet by 20 feet portion part of plot no m26A(II) (parcel no.227) chuka township is on the road reserve.

22. That My contention is that no part of plot no.m26A(II) (parcel no.227) is on the road or road reserve

23. That on 4th April 2020 the 5th and 4th respondent at the instance of the 1st respondent demolished, damaged and destroyed 20 feet by 20 feet portion part of plot no.m26 A(II) (parcel no 227) chuka township.(see exhibit no.8 above).

24. That the 1st respondent did not follow the law and procedure in ‘‘acquiring’’ 20 feet by 20 feet portion part of Plot No. m26 a II(parcel no.227) Chuka Township and neither did they follow the law and procedure of demolishing 20 feet by 20 feet portion part of Plot No. m26 A II (parcel no.227) Chuka Township.

25. That the roma valuers estimated the loss and damage suffered by the applicant to be ksh.7,993,253.60 on account of damaged building standing on plot no M26 A II(parcel no.227) by the 4th and 5th respondent at the instance of 1st defendant respondent .

26. That on 22nd May 2020 I instituted the instant case and interim orders were issued injuncting the 1st, 2nd, 3rd, 4th and

5th defendant respondents from further construction of the intended moi girls road in as much as the construction would affect plot no.m26 a(II) (PARCEL no.227) chuka town ship.

27. That it is in the interest of justice that the interim orders issued against the respondent be confirmed so that the respondent by themselves their agent or servants or person acting at their behest are restrained from constructing moi girls road in Chuka town ship pending the hearing and determination of this application and the main suit.

28. That the court should also direct the district surveyor to visit the locus in quo and in particular parcel no.m26 a II(Parcel no.227) chuka township and establish its boundaries vis-a vis moi girls road''

29. That the OCS chuka police station should be ordered and directed to make sure that orders of this court are complied with .

30. That if the orders sought are granted justice will not only be done but be seen to be done as no party will suffer prejudice in the event they are granted .

31. In the circumstances of this case the orders sought are the best and most apt and substantive justice of this case demand that the orders sought be granted otherwise if they are not granted the respondent will be given a blank cheque to act with impunity vis a vis plot no M26AII (Parcel no.227) chuka township at my expense.

32. That all which is deponed herein is true to the best of my knowledge belief and information.

Sworn at chuka by the said **ELIAS MICHENI MUGO** this.....1ST .day of..Oct. ..2020

5. I find it necessary at this juncture to reproduce the prayers sought by the plaintiff in his plaint dated **27th February, 2020**. They are:-

a. A declaration that the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th plaintiffs are owners of plots No. M.26B, M.26.A2, M.25, M.19, M.20B, M.23 and M.27B Chuka Township and the said plots are not on any road reserve let alone "Moi Girls" Road.

b. A permanent injunction against the 1st defendant, his servants, agents, assignees or any person acting on their behest from in any manner demolishing, damaging or interfering with the general user of the plaintiff's plot No. M.26B, M.26.A2, M.25, M.19, M.20B, M.23 and M.27B.

c. Costs and interest from the date of judgment.

6. It is noted that there are no 2nd, 3rd, 4th, 5th, 6th and 7th plaintiffs.

7. There is an application dated 19th June, 2020 filed by the Attorney General on **10th July, 2020**. It seeks the following orders:

1. This honourable court be pleased to certify the instant application urgent on the grounds set out on the face of the certificate of urgency filed herewith.

2. This honourable court be pleased to set aside the exparte interim injunction orders issued on **26th May, 2020** against the defendants/applicants.

3. This application and the application dated 20th May, 2020 by the plaintiff/respondent herein be given an early hearing date due to the public interest in the developments carried out by the defendants/applicants on the suit land.

4. This order be served upon the officer in Charge Chuka Police Station for implementation.

5. The costs of this application be borne by the plaintiff/respondent.

8. The application is supported by the affidavit of Dorcas Kananu Gitonga a Senior Surveyor at Kenya Urban Roads Authority. The affidavit states as follows: (pasted as availed);

I DORCAS KANANU GITONGA of P. O. Box 1394 Meru in the Republic of Kenya make oath and swear as follows:

1. That I am senior surveyor at Kenya Urban Roads Authority (KURA) the 1st plaintiff/respondent herein hence competent to swear this affidavit.

2. That the state counsel on record has read and explained to me the contents of the application dated 20th May, 2020 which I have understood and wish to swear as herein below.

3. That the application is a non starter and fails to disclose a prima facie case as the applicant has no identifiable interest and further that the suit land does not exist.

4. That the applicant is guilty of material non-disclosure disentitling him to the orders sought.
5. That the said motion has been overtaken by events rendering it moot and academic.
6. That public interest militates against the narrow and parochial interests of the applicant.
7. That the said motion is mischievous, misconceived and an abuse of court process.
8. That the plaintiff/respondent was issued with ex parte injunctive orders against the defendants/applicants through misrepresentation of facts.
9. That the plaintiff/respondent is not the registered owner of the suit land parcel of land plot NO. 26A Chuka Township he has no lease certificate registered in his favour.
10. That plot No. 26A does not exist and has never been registered at the Chuka land registry.
11. That plot No. 26 Chuka Township which is the property of county Government of Tharaka Nithi County (3rd defendant/respondent herein) was leased to one Gabriel L. Njeru Kanyi on 1st July 1994 for a period of 99 years, the same has never been leased to the plaintiff/respondent and has never been subdivided. (Annexed and marked DKG is a certified copy of green card for Plot No. 26 Chuka Township).
12. The documents relied upon by the plaintiff as evidence of prima facie ownership of plot No. 26A Chuka Township which includes a transfer form that has never been endorsed by the commissioner of lands, a letter of transfer which no lease was issued for parcel Plot No. M26A Chuka Township and not for Plot No. 26A Chuka Township as indicated on his plaint and his supporting affidavit to the application dated 20th May, 2020. They are not legal documents that confer interest to a person over a parcel of land.
13. That the land rate payment receipts, physical developments plans (PDP) and valuation reports as annexed by the plaintiff/respondent on the application dated 20th May, 2020 are not documents that confirm legal ownership of a parcel of land in Kenya.
14. That the demand letter as annexed by the plaintiff/respondent indicated plot No. 26A Chuka Township and not Plot No. 26 which the defendants/applicants are developing.
15. That the plaintiff/respondent has no locus to lay any claim on Plot No. 26 Chuka Township where the defendants/applicants are developing because it is not registered in his names.
16. That the plaintiff/respondent has no document such as a title deed, certificate of lease and/or an official search from the land registry to confirm his alleged ownership of plot No. 26A Chuka Township.
17. That the development being undertaken by the defendants/applicants is a government project using public funds that will suffer irreparable loss if injunction order issued on misrepresented facts and by a person without locus continue to stand.
18. That physical development plans as annexed by the plaintiff/respondent cannot be issued on a non-registered parcel of a land hence he ought to have (the PDP and a certificate of ownership) both of them if at all he is the lawful registered owner as he alleges, we dispute the same vehemently.
19. That in further response to the above, the said PDP, which is doubtful, has not been shown as having been approved by the director of planning or the department of survey.
20. That what is deponed herein is the true in the best of my knowledge, belief and information in support of this application.

9. Both applications were heard on 15th March, 2021. Mr. I.C. Mugo, the plaintiff's advocate sought confirmation of prayer 2 in his application dated 1st October, 2020. His oral submissions were by and large similar to the grounds on the face of the application and its supporting affidavit which have already been reproduced in full.

10. On his part advocate Sichanya for the 2nd and 3rd defendants said that he felt that the matter should be transferred to the lower court as the plaintiff had not indicated the value of the subject property. He also felt that the 2nd and 3rd defendants should not have been enjoined in this suit as roads squarely fall under the 1st defendant. He prayed that the plaintiff's application dated 1st October, 2020 be dismissed.

11. Mr. Kiongo, the advocate representing the 1st and 6th defendants made submissions by and large similar to those contained in the grounds in his application dated 19th July, 2020 and in its supporting affidavit. The main argument was that an injunction could not issue in favour of the plaintiff as he was not the owner of the suit land.

12. Regarding the intimation that the 2nd and 3rd defendants are wrongly enjoined in this suit, I will not say much. The two defendants, if

they so wish, can file a substantive application in this regard. They can also do so regarding if or if not this matter should be heard in the lower court. The 1st and 6th defendants' submissions mainly touch on ownership of the suit property. I opine that these are the issues to be heard and determined during the hearing of the main suit.

13. Prayers 4 and 4a are apparently the same and are not granted.

14. In the circumstances, I issue the following orders:

a. The plaintiff's application dated **1st October, 2020** is hereby allowed in terms of prayers 3(a) and 5 with costs to be in the cause. For avoidance of doubt prayer 2(a) is not granted.

b. The 1st and 6th defendant's application dated **19th June, 2020** is hereby dismissed with costs to be in the cause.

c. The plaintiff is granted 14 days to fully comply with order 11, CPR within 14 days of today and all the defendants are granted 14 days after receipt of the plaintiff's compliance documents to fully comply with order 11, CPR.

d. The parties will come to court for directions on 19th May, 2021.

DELIVERED IN OPEN COURT AT CHUKA THIS 20TH DAY OF APRIL, 2021

IN THE PRESENCE OF:

CA: Ndegwa

Kirimi Muturi h/b I.C. Mugo for Plaintiff/Applicant

Kiongo for AG for 1st and 6th Defendants/Respondents

Saluny present for 2nd and 3rd Defendants/Respondents

P. M. NJOROGI,

JUDGE