



**REPUBLIC OF KENYA**

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

**CHUKA ELC SUIT NO. 1 OF 2019 (OS)**

**JAMES MUTUGI MWITHI.....PLAINTIFF/1<sup>ST</sup> RESPONDENT**

**VERSUS**

**DEDAN MUGO MWANGI.....DEFENDANT**

**AND**

**ZIPPORAH KARIGU MUGAMBI.....1<sup>ST</sup> APPLICANT**

**JOHN MWATHI M'MUGAMBI.....2<sup>ND</sup> APPLICANT**

**JEREMIAH URAUKO MUGAMBI.....3<sup>RD</sup> APPLICANT**

**BEATRICE GACHUNKU .....4<sup>TH</sup> APPLICANT**

**DAVID MUTUGI KARIGU.....5<sup>TH</sup> APPLICANT**

**ESTHER KAREGI MARIGU .....6<sup>TH</sup> APPLICANT**

**JOSPHAT NJERU KIAAYA.....7<sup>TH</sup> APPLICANT**

**VERSUS**

**SABERA GAKUNDI MWITHI.....2<sup>ND</sup> RESPONDENT**

**BEATRICE KATHAMBI.....3<sup>RD</sup> RESPONDENT**

**CHARITY KAINDI.....4<sup>TH</sup> RESPONDENT**

**VIRIGINIA MUTHONI.....5<sup>th</sup> RESPONDENT**

**JOHN KIMATHI.....6<sup>TH</sup> RESPONDENT**

**ALICE KARIMI.....8<sup>TH</sup> RESPONDENT**

**GERLAND MUGAMBI.....9<sup>TH</sup> RESPONDENT**

**AND**

**JAMES MWENDAMWITHI.....10<sup>TH</sup> PROPOSED RESPONDENT**

**STANLEY MURITHI NYAMU.....11<sup>TH</sup> PROPOSED RESPONDENT**

**MARY WAMBUI MWABI.....12<sup>TH</sup> PROPOSED RESPONDENT**

## RULING

1. The Ruling in this matter was to be delivered on **24<sup>th</sup> March, 2020**. This could not be done because of complications brought about by the Corona Virus Crisis. Upon issuance of the apposite notice to the parties, the Ruling will be delivered in open court today. This is because this court lacks the necessary technological facilities to deliver the Ruling electronically. However, all precautions have been taken to ensure compliance with all measures necessary to obviate the spread of the Corona 2019 virus.

2. This application is dated **30<sup>th</sup> August, 2019** and seeks orders:

**1.The** Hon. Court do certify this application as extremely urgent and the same be heard ex-parte in the 1st instance, service of the same to be dispensed with in the 1st instance.

**2.The** Court be pleased to enjoin the Proposed Interested Parties/Applicants and the 1<sup>st</sup> to 7<sup>th</sup> Proposed Respondents to these proceedings.

**3.The** Hon. Court be pleased to review and set aside its Judgment dated 30<sup>th</sup> July 2019.

**4.The** Hon. Court do issue an order of inhibition restraining any dealings whatsoever with land parcel NO. SOUTH THARAKA/TUNYAI 'A'/390 until this application is heard and determined or until further orders of this court.

**5.The** Hon. Court do issue an order of inhibition restraining any dealings whatsoever with land parcel NO. SOUTH THARAKA/TUNYAI 'A'/390 until this suit is heard and determined

**6.The** Hon. Court be pleased to issue a temporary order of injunction restraining the Defendant and the Respondents whether by themselves, their servants, agents or any person whomsoever from doing any of the following acts that is to say evicting, demolishing the Applicants houses, selling, leasing, charging or otherwise interfering with the Applicants/Proposed Interested Parties quiet, peaceful, actual and exclusive possession, cultivation, user, development and enjoyment of their respective portions all totaling to 18 acres out of land parcel no. SOUTH THARAKA /TUNYAI 'A'/390 pending the hearing and determination of this Application interparties.

**7.The** Hon. Court be pleased to issue a temporary order of injunction restraining the Defendant and the Respondents whether by themselves, their servants, agents or any person whomsoever from doing any of the following acts that is to say evicting, demolishing the Applicants houses, selling, leasing, charging or otherwise interfering with the Applicants/Proposed Interested Parties quiet, peaceful, actual and exclusive possession, cultivation, user, development and enjoyment of their respective portions all totaling to 18 acres out of land parcel no. SOUTH THARAKA /TUNYAI 'A'/390 pending the hearing and determination of Chuka ELC (OS) no.....of 2019

**8.The** Hon. Court be pleased to consolidate this suit to (sic) Chuka ELC (OS) no. ....of 2019.

**9.The** Honorable Court do make such further orders as may meet the ends of justice in this matter

**10.Costs** of this Application be in the course

3. The application has the following grounds:

i) That Plaintiff/1<sup>st</sup> and 2<sup>nd</sup> Respondents lied to this court when they testified that they are in exclusive occupation and possession of the whole suit land

ii) That the Plaintiff and 2<sup>nd</sup> Respondent failed to disclose that they only possess and occupy seven and half (7 ½ ) acres out of the suit land whereas the Applicants jointly and severally (sic) are in occupation and possession of 18 acres.

iii) The Plaintiff and the 2<sup>nd</sup> Respondent failed to disclose that there are two other persons in possession and occupation of two acres each (total 4 acres) out of the suit land.

iv) The Applicants have been in possession and occupation of their respective portions out of suit land for periods ranging from 33 years to 26 years

v) The Applicants have already filed CHUKA ELC (OS) SUIT NO. ...20...of 2019 claiming adverse possession of their respective portions.

vi) South Tharaka/Tunyai 'A' is currently registered in the names of the Respondents after the Judgment dated 31<sup>st</sup> July 2019

vii) That previously the land was registered in the names of the Defendant.

viii) That the Respondents are currently issuing threats of eviction against the Applicants and there is real fear that the Respondents will carry out their threat and evict the Applicants from their respective homes and land.

ix) That the Applicants will be rendered homeless and they will suffer irreparable loss and damages if they are evicted before this Application is heard and determined.

4. The application is supported by the affidavit of David Mutugi Karigu which states as follows:

**I DAVID MUTUGI KARIGU of KAMBOGO VILLAGE**, Tunyai Location of South Tharaka Division of Tharaka Nithi County in the Republic of Kenya do make oath and state as follows:-

1. That I am the 5<sup>TH</sup> Applicant/Proposed Interested Party in this suit and I am competent to swear this Affidavit on my behalf and on behalf of the other Applicants (Proposed Interested Parties no. 1, 2, 3, 4, and 6.

2. That we are all residents of Kambogo Village in Tunyai Location of Tharaka Nithi County.

3. That the Respondents (Plaintiff and 1<sup>st</sup> to 7<sup>th</sup> Respondents) are the registered owners of land parcel no. South Tharaka/Tunyai 'A'/390 (Annexed and marked as DMK '1' is a copy of the Green card.

4. That prior to the Respondents being registered as proprietors of the suit land, the land belonged to the Defendant as is indicated in entrance no. 1 in the Green card.

5. That the Respondents filed this suit behind our backs even though we are also utilizing the suit land having been in possession and occupation since 1986 to present.

6. That I was personally born and brought up on the suit land by my mother who is the 1<sup>st</sup> Applicant/1<sup>st</sup> Proposed Interested Party.

7. That the 2, 3, and 4<sup>th</sup> Proposed Interested Parties are my siblings and they were also brought up on the suit land.

8. That the 6<sup>th</sup> Proposed Interested Party entered the suit land in 1993 having been invited by my mother who was the first to settle on the suit land in 1986.

9. That the Respondents also live on the suit land and they are only occupying a portion measuring 7 ½ acres out of the suit land whereas the Applicants occupy jointly and severally a total of 18 acres out of the suit land.

10. That there are other two neighbors occupying four acres out of the suit land since 1988 and 1997 respectively.

11. That it was fraudulent and a miscarriage of justice amounting to perjury for the Plaintiff and the 1<sup>st</sup> Proposed Respondent to tell this court that it is only them who are in occupation and possession of the suit land whereas we and other neighbors were already and are still in possession and occupation even before them.

12. That the 1<sup>st</sup> and 2<sup>nd</sup> Proposed Interested Party live on the suit land where they have built homes, kept their livestock and they are each utilizing portions measuring 2 ½ and 3 ½ acres respectively. They also grow crops, fruit and indigenous trees while grazing their crops in their respective portions. (annexed and marked as DMK '2' are photos showing their homes within the suit land.

13. That I personally cultivate and I am in effective and exclusive control of 3 ½ acres and the 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Proposed Interested Parties are also in effective and exclusive control of 3 ½, 2 and 3 acres respectively.

14. That 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> Proposed Interested Parties and myself utilizing our portions by cultivating our seasonal food crops, mangoe and indigenous trees and we have been utilizing these portions for more than 12 years.

15. That on 22<sup>nd</sup> August 2019, while going about our normal activities we received reports that the Respondents had descended on our portions of land with strangers and that they were intent on subdividing them without our knowledge and or consultation.

16. That we quickly confronted them and they retreated having not carried out their intended mission.

17. That the next day the Plaintiff/1<sup>st</sup> Respondent came to each one of us and purported to give us one (1) week verbal notice to vacate the suit premises claiming that they had now acquired the title deed to the land.

18. That we quickly instructed our advocate on record to investigate and find out how the Respondents had acquired land that we all along knew belonged to one Njuguna who was an absentee land lord and who was rumored to be a Kikuyu.

19. That our advocate on record quickly carried out her investigations and she informs us there land was transferred to the Respondents following the Judgment of this court dated 30<sup>th</sup> July 2019.

20. That our Advocate on Record tells us that according to law a party claiming adverse possession must show that they are in open, continuous, public, exclusive and uninterrupted occupation of the land that they are claiming.

21. That it is not true that the Respondents have been in exclusive occupation and possession of the whole suit land because we are also on the ground and in open, public, continuous, uninterrupted and exclusive occupation and possession of portions of the suit land South Tharaka/Tunyai 'A'/390 and in total our joint possession is 18 acres as follows:-

a. 1<sup>st</sup> Proposed Interested Party occupies 2 ½ acres and has lived on the suit land since 1986 having been the first occupant and the one who invited the 1<sup>st</sup> Proposed Respondent to enter the land. She brought up her children including myself on the suit land.

b. The 2<sup>nd</sup> Proposed Interested Party occupies 3 ½ acres out of the suit land and he was brought up on it, he has built his home and he cultivates and utilizes the rest of his portion to graze his cattle and keep behives.

c. The 3<sup>rd</sup> Proposed Interested Party is my brother and having been brought up on the suit land he was allocated 3 ½ acres by our mother to cultivate and eke a living from.

d. The 4<sup>th</sup> Proposed Interested Party is my sister and she was brought up on the suit land since her childhood and she was allocated 2 acres out of the suit land and she has been using it for her subsistence farming and food.

e. I being the 5<sup>th</sup> Proposed Interested Party I was born and brought up on the suit land and my mother the 1<sup>st</sup> Proposed Interested Party allocated me 3 ½ acres for my exclusive use and possession and I have been using it to cultivate and farm my subsistence food therein. I also use part of the land for grazing my livestock.

f. The 6<sup>th</sup> Proposed Interested Party is our neighbor who was allowed by our mother to enter the land and he has been utilizing a portion measuring 3 acres for his farming and livestock grazing.

22. It is not therefore true that the Plaintiff and the Proposed Respondents are the only ones utilizing the suit land which measures approximately 19 acres and half.

23. The Plaintiffs only occupy and utilize 7 ½ half an acre out of the suit land.

24. The Plaintiff lied to this court in both his sworn affidavit, his witness statement and his testimony before court.

25. The Plaintiff lied to court in order to defraud me and the other Applicants their rightful share of the suit land even though he and the Respondents are mere squatters like us and when they have no bigger right over the land than us.

26. That we have filed a suit for adverse possession of our respective portions of land and we need this Honorable Court to preserve the land until the said suit is heard and determined.

27. That unless the Court intervenes to protect us we will be evicted from the suit land before this application is heard and determined because the Plaintiff has been issuing us with daily threats and he claims he will evict us any time now.

28. That what is deposed to herein is true to the best of my knowledge, understanding and belief.

5. The application was canvassed by way of written submissions.

6. The applicant's written submissions are reproduced in full herebelow without any alterations whatsoever and without correction of any spelling or other mistakes.

#### **SUBMISSIONS ON BEHALF OF THE APPLICANTS**

**My Lord,**

The Applicants have brought this Application dated 30<sup>th</sup> August 2019 under the Civil Procedure Act, Civil Procedure Rules and the Land Registration Act. We have also filed a sister Application dated 1<sup>st</sup> October 2019.

**My Lord,**

We rely on the grounds listed on the face of the two applications and the following supporting affidavits

1. Affidavit dated 30<sup>th</sup> August 2019 sworn by the 5<sup>th</sup> Applicant on behalf of all the other Applicants

2. Further Affidavit sworn on 27<sup>th</sup> September 2019 by the 5<sup>th</sup> Applicant on behalf of himself and the other applicants.

3. Supporting Affidavit sworn by the 5<sup>th</sup> Applicant on 1<sup>st</sup> October 2019 behalf of himself and the other applicants.

#### **INTRODUCTION**

**Your Lordship;**

The essence of the Applicants case is that they have been squatters on the suit land together with the Respondents but when they filed this suit they did not disclose this information to the Court. They pretended that they are the sole occupants of the suit land. Immediately they got the land registered in their names they began threatening the Applicants with eviction and removal from the land. It is our submissions that by failing to disclose that they were not the only occupants of the suit land, and by claiming that they are in exclusive occupation of the whole suit which measures 29.5 acres or thereabouts. The reality on the ground My Lord is that the Respondents only occupy a portion measuring 7.5 acres whereas the Applicants and two other persons are in occupation of the rest of the land. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent gave false information on oath to this Court and this Honorable Court used that false information while deciding the suit leading to the Judgement sought to be set aside.

**Your Lordship,**

The 1<sup>st</sup> and 2<sup>nd</sup> Respondent committed perjury and they deserve to be punished for their crime.

In their replying Affidavit sworn by Sabera Gakundi Mugambi on 18<sup>th</sup> October 2019 they did not deny that the Applicants are occupying the suit land. They acknowledged that some of the Applicants are living on the suit land while some are grazing their livestock on the suit land. Why did they not give this information to the Court when they testified ex parte during the formal proof. The two Respondents are dishonest and their acquisition of title to land parcel no. South Tharaka/Tunyai 'A'/390 is tainted, is fraudulent and falls within the exceptions of section 26 of the Land Registration Act. We pray that the Judgement of 30<sup>th</sup> July 2019 be reviewed, set aside and the suit be heard a fresh after it is consolidated with suit no.CHUKA ELC (OS) 20 of 2019.

**Your Lordship;**

The land has already changed hands. The two Respondents having been registered as trustees of the suit land as directed by the Court went ahead to sell portions of it to the Proposed Interested Parties. Their conduct clearly demonstrates that they were not utilizing the portions they have sold and that all they needed was to obtain title and dispose of the land as quickly as possible. This is contrary to what they told the court that they have put the whole land into use.

**My Lord,** our prayers are as follows my Lord:-

1. Spent
2. Spent
3. The Hon. Court be pleased to review and set aside its Judgment dated 30<sup>th</sup> July 2019.
4. Spent
5. The Hon. Court do issue an order of inhibition restraining any dealings whatsoever with land parcel NO. SOUTH THARAKA/TUNYAI 'A'/390 until this suit is heard and determined
6. Spent.
7. The Hon. Court be pleased to issue a temporary order of injunction restraining the Defendant and the Respondents whether by themselves, their servants, agents or any person whomsoever from doing any of the following acts that is to say evicting, demolishing the Applicants houses, selling, leasing, charging or otherwise interfering with the Applicants/Proposed Interested Parties quiet, peaceful, actual and exclusive possession, cultivation, user, development and enjoyment of their respective portions all totaling to 18 acres out of land parcel no. SOUTH THARAKA /TUNYAI 'A'/390 pending the hearing and determination of Chuka ELC (OS) no 20 of 2019
8. The Hon. Court be pleased to consolidate this suit to Chuka ELC (OS) no. 20 of 2019.
9. The Honorable Court do make such further orders as may meet the ends of justice in this matter
10. Costs of this Application be in the court.

**BACKGROUND**

The subject matter of the suit is ownership of land parcel no South Tharaka/Tunyai 'A'/390 which was initially registered in the name of DEDAN MUGO MWANGI.

The Plaintiff/1<sup>st</sup> Respondent claimed that he and his family comprised of the 2<sup>nd</sup> to 7<sup>th</sup> Respondent had acquired adverse possession and that they should be registered as the owners thereof.

Default judgment was entered against the Defendant who did not enter appearance despite being served through a newspaper advertisement. After this the 1<sup>st</sup> and 2<sup>nd</sup> Respondents testified as PW 1 and PW 2 respectively and judgment was entered in their favor. Later a decree was

issued cancelling the title deed held by the Defendant and the whole land was then registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to hold the land in trust for the other Respondents. It is on the authority of this Judgment, decree and registration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent descended on the suit land accompanied by a surveyor to subdivide the land and evict the Applicants.

Upon further inquiries the Applicants discovered that the two Respondents had acquired registration of the land in their name through perjury for they lied to this Hon court that they are in exclusive occupation and possession of the whole suit land even though they are not. It is the Applicants submissions that the whole judgment was obtained by false pretend; on perjured evidence and that the same ought to be reviewed and set aside for ends of justice to be met.

We submit the following issues for determination on behalf of the Applicants my Lord

#### **APPLICANTS ISSUES FOR DETERMINATION**

- a. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents perverted justice when they gave false evidence amounting to perjury to the court
- b. What was the effect of the perjury committed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to the case.
- c. Whether the Applicant has satisfied the test for granting an injunction and inhibition
- d. Whether this court has powers to review and set aside the judgment
- e. Whether orders of inhibition should be issued to preserve the suit land
- f. Whether the Respondents should be restraining from interfering with the Applicants stay and use of the portions they occupy on the suit land.
- g. Whether this suit should be consolidated with Chuka ELC Suit no. OS 20 OF 2019
- h. Which other orders are appropriate in the circumstances of this suit
- i. Who gets to bear the cost of this application

#### **SUBMISSIONS**

My Lord, when this Court issued its Judgment on 30<sup>th</sup> July 2019 it did so with a 'heavy heart' while noting that the 1<sup>st</sup> Respondent who testified as PW 1 had exhibited dishonesty in several aspects. It is the 1<sup>st</sup> Respondent who had filed the suit.

My Lord, it was on the testimony of the 2<sup>nd</sup> Respondent that the Honorable Court hinged its subsequent judgment after finding that the 1<sup>st</sup> Respondent could not be trusted to tell the truth. Because the suit was not defended the Court 'on a preponderance of evidence' the Court issued the Judgment and Decree in favour of the Respondents.

My Lord, the Pleadings and averments of the Respondents in their witness statements is tainted with untruth and lies for even though they claimed to be in exclusive possession and occupation of the whole land this is far from the truth. Immediately they got the title deed registered in their names, the Respondents went to the Applicants and began to issue them with threats to vacate the suit land even though they knew very well that the Applicants were squatters just like them and that they did not have a bigger claim over the land than the Applicants.

My Lord it is our submissions that had the Respondents told the court the true position of how things are on the ground, the court could not have issued the default judgment of 30<sup>th</sup> July 2019 before hearing the Applicants and others who would be adversely affected by the Judgment.

The Respondents did not come to court with clean hands and because of this they should not be allowed to enjoy the fruits of their evil scheme and conspiracy.

My Lord, we refer your Lordship to section 26 (a) and (b) which states as that a title deed can be challenged on the ground of fraud, misrepresentation to which a person is proved to be a party and where the certificate was acquired illegally, procedurally, or through a corrupt scheme.

We rely on your Lordship's observations in the judgment that

'It is hoped that PW1 and PW2 have not committed perjury and contrived to execute a fraudulent scheme. Should this be the case, they are inviting serious consequences and veritable opprobrium.'

We submit that the Respondents committed perjury by telling lies to this court that they had acquired the whole suit land through adverse possession.

My Lord, in their testimony they told the Court that they had acquired adverse possession of the whole suit land because they had been in open, public, continuous and exclusive occupation at the time of filing suit. The suit is 29 and half acres.

Yet immediately they acquired the title deed they moved with speed to write eviction letters against the Applicants who were also in occupation and who had acquired adverse possession of portions of the suit land.

If indeed the Respondents were in exclusive occupation of the whole suit land why were they issuing threats and eviction notice against the Applicants and why did they register a portion of the suit land in the names of the 2<sup>nd</sup> Respondent JOHN MWATHI MUGAMBI. The answer is contained in the sworn affidavit of the 2<sup>nd</sup> Respondent sworn on 18<sup>th</sup> October 2019. In that sworn affidavit which contradicts the testimony she gave in court, the 2<sup>nd</sup> Respondent acknowledges that the Applicants have been in occupation on portions of the suit land and that fact was known to the Respondents when they filed this suit.

My Lord we submit that what the Hon court feared when it noted the following has come to pass:

*It is hoped that PW1 and PW2 have not committed perjury and contrived to execute a fraudulent scheme. Should this be the case, they are inviting serious consequences and veritable opprobrium.'*

The Court had also noted in its Judgment that:-

‘As happens in undefended cases, courts cannot know if the evidence adduced is truthful or not. This is why such suits are amenable to successful reviews and appeals’

My Lord, perjury is a serious criminal offence as noted by Hon. M. Mbaru in the case of **JAMES MULINGE V FREIGHT WINGS LTD & 3 OTHERS [2016] EKL** when she stated that:-

‘ In this regard, Perjury is the crime of making a knowingly false statement which bears on the outcome of an official proceeding that is required to be testified to under oath. The offence of perjury is a criminal offence’

Section 108 of the Penal Code describes perjury in the following terms:-

108. Perjury and subornation of perjury

(a) Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then pending in that proceeding or intended to be raised in that proceeding, is guilty of the misdemeanor termed perjury.

(b) It is immaterial whether the testimony is given on oath or under any other sanction authorized by law.

(c) The forms and ceremonies used in administering the oath or in otherwise binding the person giving the testimony to speak the truth are immaterial, if he assent to the forms and ceremonies actually used.

(d) It is immaterial whether the false testimony is given orally or in writing.

(e) It is immaterial whether the Court or tribunal is properly constituted, or is held in the proper place or not, if it actually acts as a Court or tribunal in the proceeding in which the testimony is given.

(f) It is immaterial whether the person who gives the testimony is a competent witness or not, or whether the testimony is admissible in the proceeding or not.

**My Lord,**

In the case of **DAVID OMWENGA MAOBE VS REPUBLIC (2015) EKL**, it was observed that a person can and will be charged with perjury even after obtaining judgement in his favor through perjury.

‘This is because judges, (and indeed magistrates) often base their verdicts, sentences or other important decision on sworn testimony and signed documents. Statements given under oath are presumed to be truthful or at least made in good faith. This is why the legal effect of an oath is to subject the person to penalties for perjury if testimony is false.’ The Judge, C.B NAGILLAH while declining with the decision to charge the Appellant who had sought protection from a prosecution for the crime of perjury noted that:-

‘Perjury subverts and perverts the public justice system and is abhorred. The perpetuation must be stopped if the public justice system were to retain credibility.’

**My Lord,**

It is our submissions that this Court has unlimited discretion to set aside a default judgment when the said judgment has been obtained by false evidence. This is in accordance with Order 10 Rule 11 of the Civil Procedure Rules which provides as follows:-

Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

**My Lord,**

In the case of **CHUMO ARAP SONGOK VS DAVID KIBIEGO CA NO. 141 OF 2004 (NAKURU)** the Court of Appeal observed that 'a court of law is not powerless in the face of an illegality to correct an illegality and to do substantive justice'.

**My Lord**

It was unfair for the Respondents to claim land that they were not in possession of and which they had not acquired adverse possession of because it was in the hands of the Applicants and other persons. By keeping this information away from the court the Respondents have perpetrated an illegality and their action had denied the Applicants the right to be heard contrary to the constitutional guarantees.

**My Lord,**

It was stated in **ONYANGO OLOO VS A.G (1986 – 89) EA 456** (referenced in **JAMES KANYIITA NDERITU & ANOTHER VS MARIOS PHILOTAS GHIKAS & ANOTHER (2016) eKLR** that the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. We pray for justice to be done so that the Applicants are not condemned unheard in a matter as crucial as this where they claim that even before the 1<sup>st</sup> Respondent filed suit they have already acquired adverse possession of the suit land.

**My Lord,**

My Lord in the same vein we submit that by virtual of having obtained title by false evidence the title currently held by the Respondents and or any one they have passed title to is tainted and is a proper candidate for cancellation.

**My Lord,**

Order 45 Rule 1 of the Civil Procedure Rules provides that any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

**My Lord,**

We pray for a review of the judgment and the setting aside of the Courts judgment and decree of 30<sup>th</sup> July 2019 under the above Order and other enabling Acts my Lord.

**My Lord,**

We submit that this Honorable Court has the powers to grant the prayer for inhibition of the suit land. This is provided for under section 68 of the Land Registration Act.

**Your Lordship.**

The conditions for the grant of an interlocutory injunction are set out in the case of **GIELLA VS CASSMAN BROWN (1973) EA 358 at 360**. In the first instant, the applicant must show a prima facie case with a probability of success; that they will suffer irreparable injury which would not be compensated by an award; and that the balance of convenience favours the applicant.

**Your Lordship.**

On the issue of a prima facie case we rely on the grounds set out in the body of the Application and supporting affidavits including the exhibits. There is no doubt that the Respondents intention is to remove the Applicants from the suit land which they have already sold to third parties. There is real danger that unless the suit land is preserved and the status quo maintained the Respondents together with the third parties to whom they have sold portions of the suit land will remove the Applicants and destroy their properties and developments on the suit land.

**My Lord,**

The two Replying Affidavits sworn by the 2<sup>nd</sup> Respondent on 18<sup>th</sup> October 2019 and one Stanley Murithi Nyamu on 18<sup>th</sup> October

2019 and 17<sup>th</sup> October 2019 respectively clearly demonstrate that the Respondents are in the process of disposing the suit land as fast as they can and without taking into consideration the interests and rights of the Respondents who live on the suit land.

**My Lord.**

At the same time my Lord we pray for restraining orders to issue against the Respondents to stop harassing and threatening the Applicants with eviction and removal from the suit land until this application and suit is heard and determined.

**On Whether this suit should be consolidated with Chuka ELC Suit no. OS 20 OF 2019**

**My Lord**

We also pray to have this suit once the Judgement and decree has been set aside to be consolidated with Chuka ELC OS no. 20 of 2019 for the following reasons. In that suit my Lord the Applicants have filed for adverse possession against the current registered owners of the suit land. The subject matter is therefore similar to this suit and as it was laid out in the case of **NYATI SECURITY GUARDS & SERVICES VS MUNICIPAL OF MOMBASA (2000) eKLR** the principles favouring consolidation are as follows:-

1. The common question of law and fact arises in both or all of them
2. The rights or relives claimed in them are in respect of or arise out of the same transaction.
3. For some reason it is desirable to make an order for consolidating them

**My Lord**

There is no doubt this and suit no. Chuka ELC OS no. 20 of 2019 concerns the same issue; a claim of adverse possession of land parcel no South Tharaka/Tunyai 'A'/390 previously registered in the names of the Defendant. The Applicants having lived on the suit land for more than 12 years had already acquired adverse possession of the suit land even before the Judgment and decree of 30<sup>th</sup> July 2019 had been entered in favour of the Respondents. It is therefore necessary that the claims of the Respondents and the Applicants be heard on merit and the same be decided once and for all.

**My Lord:**

We wish to rely on the cases of **JOSEPH OKOYO VS EDWIN DICKSON WASSUNA (2014) eKLR and CHESINDE FARMERS COOPERATIVE SOCIETY LIMITED VS JOEL K BETT(KERICHO HIGH COURT SUIT NO. 25 OF 2017)** in which the courts allowed consolidation of two suits even though the parties were seeking different remedies.

In the present suit my Lord;

The Applicants are seeking a remedy against the current registered owner of the suit land whereas in the present suit the Respondents are seeking remedy against the previously registered owner whose title deed was cancelled by decree of the Honorable Court. It has been observed by the Supreme Court in Supreme Court Petition No. 14 of 2013 (Law Society of Kenya vs The Center for Human Rights) that the 'essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for fair and impartial dispensation of justice to the parties'.

We submit that such consolidation will also meet the overriding objective of the Civil Procedure Act by saving judicial time and effort.

**My Lord**

We also pray for any other prayers that the Court may find expedient to give as well as the costs of the Application.

**DATED AT MERU THIS...19<sup>TH</sup> DAY OF NOVEMBER, 2019**

**NJIRU KITHAKA & CO**

**ADVOCATES FOR THE APPLICANTS**

7. The respondents' submissions are reproduced in full herebelow without any alterations whatsoever and without correction of any spelling or other mistakes.

**RESPONDENTS SUBMISSIONS**

If it may please your Lordship:

What is before this Honourable Court are the applicant's applications dated 30<sup>th</sup> August, 2019, and 1<sup>st</sup> October, 2019.

In the application dated 30<sup>th</sup> August, 2019 which was brought to court under the vacation rules the applicants pray the court for several orders namely:-

1. The Honourable Court do certify this application as extremely urgent and the same be heard ex-parte in the first instance, service of the same be dispensed with in the first instance.
2. The court be pleased to enjoin the proposed interested parties/applicants and the 1<sup>st</sup> to 7<sup>th</sup> proposed respondents to these proceedings.
3. The Honourable court be pleased to review and set aside its judgment dated 30<sup>th</sup> July, 2019.
4. The Honourable court do issue an order of inhibition restraining any dealing with land parcel No. SOUTH THARAKA / TUNYAI "A" / 390 until this application is heard and determined or until further orders of this court.
5. The Honourable court do issue an order of inhibition restraining any dealings whatsoever with land parcel No. SOUTH THARAKA / TUNYAI "A" / 390 until this suit is heard and determined.
6. The Honourable court be pleased to issue a temporary order of injunction restraining the Defendant and the respondents whether by themselves, their servants, agents or any person whatsoever from doing any of the following acts, that is to say evicting, demolishing the applicants' house, selling, leasing, charging or otherwise interfering with the applicants / proposed interested parties quiet, peaceful, actual and exclusive possession, cultivation, user development and enjoyment of their respective portions all totaling 18 acres out of the land parcel No. SOUTH THARAKA/TUNYAI "A"/390 pending the hearing and determination of this Application inter parties.
7. The Honourable court be pleased to issue a temporary order of injunction restraining the defendants and the respondents whether by themselves, their servants and agents or any person whomsoever from doing any of the following acts, that is to say evicting, demolishing the applicants' houses, selling, leasing charging or otherwise interfering with the applicants proposed interested parties quiet, peaceful actual and exclusive possession cultivation, user, development and enjoyment of their respective portions totaling 18 acres out of land parcel number SOUTH THARAKA / TUNYAI "A" / 390 pending the hearing and determination of Chuka ELC (OS) NO. 20 of 2019.
8. The Honourable court be pleased to consolidate this suit to Chuka ELC (OS) No. 20 of 2019.
9. This Honourable court do make further orders as may meet the ends of justice in this matter.
10. Costs of this application be in the cause.

The other applications are dated 1<sup>st</sup> October, 2019.

One seeks for orders that the applicants be given leave to amend the plaint for reasons that the parcel of land, the suit property known as SOUTH THARAKA / TUNYAI / "A" / 390 had been sub-divided into seven new parcels, namely THARAKA/TUNYAI "A" /4586, 4587, 4588, 4589, 4590, 4591 and 4592. This aspect of the sub-division had not been known to the applicants at the time of filing the suit on 30<sup>th</sup> September, 2019.

This is what prompted them to file the application for leave to amend the plaint.

My Lord the other application of the even date seeks for orders to review and vary the interim order of 4<sup>th</sup> September, 2019 to include the order of inhibition against the titles of the seven sub-divisions instead of the original South Tharaka/Tunyai "A" /390.

The application also seeks for an order to enjoin the 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> proposed respondents.

The applicants filed their application dated 30<sup>th</sup> August, 2019 under the Court Vacation Rules and supported the same with a certificate of urgency. They moved to court ex-parte on 4<sup>th</sup> September, 2019. They were granted ex-parte orders to the effect that the proposed interested Parties/ Applicants and the 1<sup>st</sup> to 7<sup>th</sup> proposed Respondents be enjoined in these proceedings. It was further ordered that an order of inhibition do issue restraining any dealings whatsoever with the parcel of land SOUTH/THARAKA/TUNYAI "A" /390 pending the hearing and determination of that application.

Thirdly they were issued also an order of interim injunction restraining the Defendant and Respondents from interfering with the interested parties/applicants peaceful occupation of their respective portions of the suit land i.e. SOUTH/THARAKA/TUNYAI "A"/390 pending the hearing and determination of the application. There was a further order that the plaintiff and the proposed respondents be served with the application within 5 days of the order and the inter-parties hearing was fixed for 25<sup>th</sup> September, 2019.

Your Lordship, when the plaintiff and the proposed interested Parties/Respondents were served, they, on 25<sup>th</sup> September, 2019, through their counsel on record filed and served their Notice of Preliminary Objection to the effect that the applicants' application is scandalous, frivolous as the subject matter sought to be preserved had ceased to exist.

Your Lordship, nothing can be clearer and apparent than the pleading by the proposed respondents.

In their pleadings and in particular ground 2 of their chamber application dated 30<sup>th</sup> August, 2019 they specifically state that the judgment in this suit was delivered on 30<sup>th</sup> July, 2019 and it directed that land parcel No South Tharaka/Tunyai "A"/390 be registered in the names of the plaintiff and 2<sup>nd</sup> to 7<sup>th</sup> proposed Respondents.

Your Lordship, the records in the Court file will show that as per the court's directive the Title for South / Tharaka / Tunyai "A" /390 to the proposed Respondents was issued on 8<sup>th</sup> August, 2019. To facilitate the transfer to them of their respective titles, the sub-divisions were done and Title closed on 29<sup>th</sup> August, 2019 following the sub-divisions which resulted to parcels Nos. 4586 to 4592.

This clearly shows that at the time of filing this application and whatever other intended suit the suit land which is pleaded in their application i.e. SOUTH THARAKA / TUNYAI "A" /390 was nonexistent.

Their application is therefore, to say the least, frivolous, non-starter and an abuse of the court process. The orders issued ex-parte on 4<sup>th</sup> September, 2019 were in vain.

Your Lordship, we shall be failing in our duty to this court if we do not address you on the allegations raised by the Ann Nyambura Kithaka in ground 7 in support of the Applicants' application.

Your Lordship the allegation I am referring to, and which comes from the mouth, of an Advocate who is not party to these proceedings is that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent committed perjury when they lied to court that they are in an exclusive occupation and possession of the suit land.

Your Lordship, if you read the Replying Affidavit of SABERA GAKUNDI MWITHI sworn on 18<sup>th</sup> October, 2019 and filed on the same day, paragraphs 5,6,7,8,9,10 and 11 are very clear. In these paragraphs she is clearly telling the court it is Zipporah Mugambi who is lying.

She clearly says the land belonged to her late husband. That she is the one who invited Zipporah to put up a shelter. When she acquired the title she informed her about the development and Zipporah pleaded with her not to chase her away because she did not have anywhere else to go. She requested her to give her son John Mwathi Mugambi, the 2<sup>nd</sup> applicant who lived with her, a portion of that land where the two would stay. Out of humanity they gave the son, John Mwathi Mugambi 0.61 hectare and issued him with the title deed for it. The copy of the title is exhibited on her affidavit and marked "SKM 1".

When the other sons learnt about it they thought the land was up for grabs and started invading it. Your Lordship that is why you see so many people coming up claiming a share of that land.

The 2<sup>nd</sup> proposed Respondent has also in her Replying Affidavit exhibited Search Certificates to show that the applicants do not come from that area but from the area where their mother had been married.

Your Lordship, the first applicant is their mother who claims she settled there after being chased by the relatives of her husband. The 2<sup>nd</sup> applicant, John Mwathi M'Mugambi, is the one who has been issued with a title for portion of that land by the Proposed Respondents. There is a Search Certificate of Title, THARAKA/CHIOKARIGA "A" /627 for the 3<sup>rd</sup> applicant, Jeremiah Murauko Mugambi.

There is also a Search Certificate for THARAKA / CHIAKARIGA "A"/2352 in the name of the other son DAVID MUTUGI KARIGU, the 6<sup>th</sup> Applicant. There is also a portion marked 2896 meant for the 7<sup>th</sup> Applicant, Josphat Njeru Kiaya. Their pieces of land are at Chiakariga, far away from Tunyai where their mother was settled by the 2<sup>nd</sup> Respondent after being chased away from her matrimonial home.

Your Lordship, the proposed Respondents have acquired their parcels of land though a claim premised on the doctrine of adverse possession.

Your Lordship the reading of the applicants' pleadings reveal that they claim to have also acquired title to their respective portions by way of adverse possession because they have been in occupation for a period ranging from 26 to 33 years.

Your Lordship we would urge you to believe that it is the applicants who are not telling the truth. These are the same people telling the court that the plaintiff, James Mutugi Mwithi is one and the same person calling himself James Mwenda Mwithi.

We have demonstrated that they are two different people by exhibiting to this court their respective identity cards.

Your Lordship, we all know that a claim for acquisition of land by a plea of adverse possession is an equitable claim. The proposed respondents claimed that they acquired the land by way of adverse possession from the registered owner DEDAN MUGO MWANGI. They moved to court and proved their case and were awarded the land.

Your Lordship, we would invite you to read the Supporting Affidavit of DAVID MUTUGI KARIGU sworn on 30<sup>th</sup> August, 2019 in support of this application wherein he says in paragraph 5 that they have been utilizing this land since 1986. In paragraph 17 of this

Affidavit the said David Mutugi Karigu says the plaintiff went to them and purported to give them (1) week verbal notice to vacate the suit premises claiming that they had now acquired the title deed to the land. In paragraph 18 he says they quickly instructed their Advocate to investigate and find out how the respondents had acquired that land that they all along knew belonged to “one Njuguna” who was an absentee land lord and who was rumoured to be a Kikuyu.

With respect the name Dedan Mugo Mwangi cannot be the same as “Njuguna”.

They should be talking about a different parcel all together.

Your Lordship the readings of paragraph 12 of David Mutugi Kiragu’s Affidavit under reference confirms what the 1<sup>st</sup> and 2<sup>nd</sup> respondents are telling the court. He say’s.

“The 1<sup>st</sup> and 2<sup>nd</sup> proposed interested party live on the suit land where they have built house, kept livestock and they are each utilizing portions measuring 2 ½ and 3 ½ acres respectively.....”

The 1<sup>st</sup> proposed interested party is Zipporah Karigu Mugambi, and the 2<sup>nd</sup> interested party is John Mwathi M’Mugambi. These are the people the respondents are saying the 1<sup>st</sup> proposed interested party pleaded to be given a place to stay because she did not have anywhere to go. The 2<sup>nd</sup> interested party is the son who was given 0.61 hectares by the respondents to enable them continue living there with the mother, the 1<sup>st</sup> applicant. This first confirms as true what the respondents are saying.

We have stated above that plea of adverse possession is an a plea in equity. The two rivals are claiming the same rights.

Your Lordship what we know is that one of the maxims of equity is that “Delay defeats equity or equity aids the vigilant and not the indolent”. Where a party has slept upon his right and acquiesced for a great length of time a court of equity will not be called to aid state demands.

What is being pleaded by the applicants, is that they have been in occupation of the parcel of land belonging to “Njuguna” for 33 years. No action was taken by them to enforce their right of adverse possession although that right arose 12 years earlier.

We submit that a court of equity can only be called into activity by conscience, good faith and reasonable diligence; where these are wanting the court of equity is passive and does nothing.

Secondly, and on the same tone it is also a maxim of equity that where there is equal equity the first in time shall prevail. That maxim governs questions of priority of rival claimants to the same property in equity.

If the applicants had the same right and claim as the Respondents, which is not admitted, the same claims being in equity, the Respondents claim was first in time and therefore prevails over the applicant’s claim.

We would therefore urge your Lordship to hold that the applicants’ claim is a claim in futility first, because the property sought ceased to exist long before the present application was filed; secondly the same became stale state the applicants having slept on their right for a period in excess of 21 years (33-12) and thirdly the Respondent’s claim was first in time and therefore prevailed over the applicant’s claim.

Your Lordship we would also like to address the court on the purport of Section 28 (h) of the Land Registration Act.

The applicants claim that they also had acquired part of the suit land by virtue of the limitation of Actions Act. Assuming what they say is true, can that claim be revisited on the Proposed Respondents?

Your Lordship, in our view the answer is no. When they acquired title (if at all) the respondents were not the registered owners. They acquired title, if at all against, Dedan Mugo Mwangi. If they are in occupation their time will start running from 23<sup>rd</sup> September, 2019 when the proposed respondents were registered.

This boils back to our previous submission that equity will not be called to aid the indolent. Theirs is a stale demand. You cannot claim to have acquired title by limitation of actions or prescription and you do not move the court to confirm those rights. You are an idler and equity will not aid you. This is the position as regards the applicants’ claim.

We now turn to the application dated 1<sup>st</sup> October, 2019.

There are two application’s dated 1<sup>st</sup> October 2019. One of them basically seeks for orders of amendment of “her plaint” as per the annexed copy. Although we do not see any plaint in these pleadings, the proposed respondents are not opposed to the proposed amendments if they will be of any assistance to the applicants.

The other application seeks for an order to join 3 more proposed Respondents, namely James Mwenda Mwithi (alleged by the applicant to be the same person as James Mutugi Mwithi) as the 10<sup>th</sup> Respondent, Stanley Murithi Nyamu as the 11<sup>th</sup> Proposed Respondent and Mary Wambui Mwobi as the 12<sup>th</sup> Proposed Respondent.

The records indicate that 11<sup>th</sup> Proposed Respondent whom we act for has responded to this application and has filed a Notice of Preliminary Objection on 10<sup>th</sup> October, 2010 citing 3 grounds why he thinks this application by the applicants is not merited.

The first ground he raises is that the three proposed respondents i.e. 10<sup>th</sup>, 11<sup>th</sup>, and 12<sup>th</sup> were not parties in ELC suit No.1 of 2019(OS). We hold that they perhaps want to join them as nominal Defendants.

The second ground is that ELC Suit No. 1 of 2019 (OS) in which they are sought to be enjoined was conclusively adjudicated, decree issued and the land, the subject matter ceased to exist. This is all evident from the pleadings in this suit.

The third ground of objection is that the 11<sup>th</sup> and 12<sup>th</sup> Respondents are purchasers for value without notice of any claim from the applicants. This ground is confirmed by the 2<sup>nd</sup> proposed Respondent, Sabera Mwithi in paragraph 17 of her Affidavit filed herein on 18<sup>th</sup> October, 2019. The Replying Affidavit of MARY WAMBUI MWOBWI sworn on 18<sup>th</sup> November, 2019 clearly shows she acquired her portion for value.

Your Lordship the provisions of the Land Registration Act, 2012 and in particular Sections 25 and 26 of the said Act are plainly clear.

The relevant sections read as follows:-

“25 (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto; free from all other interests and claims whatsoever, but subject:

- a. To lease, charges and other circumstances and to the conditions and restrictions, if any shown in the register.
- b. To such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed.

(2).....

26(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:-

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme.

(2).....

Your Lordship the pleadings herein disclose that the 11<sup>th</sup> and 12<sup>th</sup> proposed respondents obtained their parcels of land for valuable consideration and the certificates of title issued to them are absolute and indefeasible.

Your Lordship there is no fraud that can be inferred from the court proceedings in this matter against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The applicants allegations that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed the suit behind their backs does not constitute fraud.

The Respondents were enforcing their rights and were not duty bound to tell the applicants about their suit.

The allegation that the Respondents went against the judgment of the court by transferring the land to persons not named in the court decree is not true. It will be observed from annexure “DMK4” in the Affidavit of David Mutugi Karigu sworn and filed on 1<sup>st</sup> October, 2019 that the decree in the suit entry (3) was registered on 8<sup>th</sup> August, 2019 and the Title Deed in those names issued. The Transfer to the people complained of was done on 23<sup>rd</sup> September, 2019 by people registered by virtue of the decree

This was after the consent to sub-divide and transfer to them had been granted.

We therefore humbly submit that the titles, to the Respondents were acquired legally, procedurally and no corrupt methods were employed.

The Respondents have acknowledged that the 1<sup>st</sup> and 2<sup>nd</sup> applicants have been on that land and have given them share of the land and issued them with the Title Deed for it. The other applicants do not live on that land and they have so stated. They say they grace thereon.

The Respondents have attached copies of Search Certificates to show where their parcels of land are. If there is any fraud, it is the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> applicants who want to commit it by lying to court that they have also been in occupation.

The applicants think this land is up for grabs just because the Respondents have acquired it without any payment.

We submit that the applicant's applications have no merits and should be dismissed. Let the suit which has been finalized, decree drawn and executed rest in peace.

Let the costs follow the event. We so pray, Your Lordship.

**DATED** at Chuka this 28<sup>th</sup> day of November, 2019

**KAAL, MUGAMBI & CO**

**ADVOCATES FOR THE RESPONDENTS**

8. I have carefully considered the pleadings and the submissions proffered by the parties to buttress their diametrically divergent assertions. I do note that the impugned judgment was delivered after the plaintiff in the original suit had served the defendant by way of substituted service. There is always a danger that that mode of service may not reach some of the Interested Parties.

9. There are serious allegations of perjury on the part of some of the respondents. Perjury can only be satisfactorily canvassed during some sort of hearing. It is clear that the applicants who were not parties in the original suit had no opportunity to file an appeal after the impugned judgment was delivered. In the interest of Justice, I find it necessary for the applicants to be heard.

10. In the circumstances, I issue the following orders:-

a. Prayers 2, 5, 7 and 8 in the application are allowed.

b. Mutatis mutandi's all orders issued by the court in this matter remain extant until this matter and its consolidation with ELC 20 of 2019 is heard and determined.

c. Costs shall be in the cause.

**Delivered in open Court at Chuka this 5<sup>th</sup> day of May, 2020** in the presence of:

CA: Ndegwa

Miss Mutegi for the applicant

Respondents and their advocate absent

**P. M. NJOROGI,**

**JUDGE.**