



**REPUBLIC OF KENYA**

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

**CHUKA ELC CASE NO. 01 OF 2020**

**GILBERT GITARI BORE.....1<sup>ST</sup> PLAINTIFF**

**OMARI MARIJAN OMARI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENYA URBAN ROADS AUTHORITY.....1<sup>ST</sup> DEFENDANT**

**THE ADMINISTRATOR – CHUKA TOWNSHIP.....2<sup>ND</sup> DEFENDANT**

**THE COUNTY GOVERNMENT**

**OF THARAKA NITHI.....3<sup>RD</sup> DEFENDANT**

**HYPER CONSTRUCTIONS &**

**EQUIPMENT COMPANY LTD.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. This application filed by the 3<sup>rd</sup> defendant's advocate seeks orders:

1. **THAT** this Application be certified as urgent and service thereof be dispensed with at the first instance.
2. **THAT** this Honourable Court be pleased to grant a stay of execution of the herein Judgment together with the resultant Decree, as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, pending the hearing and determination of this Application *inter-partes*.
3. **THAT** this Honourable Court be pleased to summon Dennis Murimi Gitari for purposes of cross-examination by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Advocates on his Affidavit of Service sworn on 4<sup>th</sup> April 2020.
4. **THAT** this Honourable Court be pleased to set aside the Judgment delivered on 13<sup>th</sup> October 2020 and all preceding or subsequent orders made against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
5. **THAT** this Honourable Court be pleased to grant leave to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to enter appearance and file a Statement of Defence out time.
6. **THAT** the costs of this Application be provided for.

2. The application has the following grounds:

- a) **THAT** through a Plaint dated 1<sup>st</sup> April 2020, the Plaintiffs moved this Honourable Court seeking several orders, the particulars of which are well set out in the said Plaint.
- b) **THAT** the Plaintiffs' case against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants proceeded undefended whereafter this Honourable Court delivered a Judgment on 13<sup>th</sup> October 2020.

c) **THAT** in an Affidavit of Service sworn on 4<sup>th</sup> April 2020, by one Dennis Murimi Gitari, nowhere does the process server mention effecting service of copies of Summons to Enter Appearance and the accompanying Plaintiff upon the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

d) **THAT** from the record, it is clear that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were not served with Summons to Enter Appearance and the accompanying Plaintiff.

e) **THAT** the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were not aware of the herein suit's existence until 25<sup>th</sup> January 2021 when the 3<sup>rd</sup> Defendant's Principal Legal Officer stumbled on the Ruling delivered herein on 7<sup>th</sup> April 2020 on Kenya Law's case search engine while researching on a different matter.

f) **THAT** the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are desirous of defending the herein suit.

g) **THAT** the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have a reasonable Defence that raises triable issues and thus should be given a chance to defend the herein suit.

h) **THAT** the Plaintiffs are likely to execute the herein Decree at any time.

i) **THAT** should the Plaintiffs proceed to execute the herein resultant Decree, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants shall suffer irreparably as they will have been condemned unheard.

j) **THAT** the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants seek this Honourable Court's urgent intervention by way of an order of a stay of execution of the herein Judgment and the resultant Decree, as against them, pending the hearing and determination of the Application filed herewith *inter-partes*.

k) Other grounds to be adduced at the hearing hereof.

3. The application is buttressed by the affidavit of Lilian Gatwiri Kiruja, the Principal Officer of the 3<sup>rd</sup> defendant and it states as follows:

#### **SUPPORTING AFFIDAVIT**

I, **LILIAN GATWIRI KIRUJA**, of Post Office Box Number 10 – 60406 Kathwana within the Republic of Kenya do hereby make oath and state as follows: -

1. **THAT** I am a Principal Legal Officer in the County Government of Tharaka Nithi, and in my capacity, I am well seized of the facts and attendant circumstances surrounding this matter. I am therefore competent to make and swear this Affidavit on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

2. **THAT** through a Plaintiff dated 1<sup>st</sup> April 2020, the Plaintiffs moved this Honourable Court seeking several orders, the particulars of which are well set out in the said Plaintiff.

3. **THAT** the Plaintiffs' case against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants proceeded undefended whereafter this Honourable Court delivered a Judgment on 13<sup>th</sup> October 2020.

4. **THAT** in an Affidavit of Service sworn on 4<sup>th</sup> April 2020, by one Dennis Murimi Gitari, nowhere does the process server mention effecting service of copies of Summons to Enter Appearance and the accompanying Plaintiff upon the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. *Annexed hereto and marked 'LGK-1' is a copy of the said Affidavit of Service.*

5. **THAT** from the record, it is clear that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were not served with Summons to Enter Appearance and the accompanying Plaintiff.

6. **THAT** the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were not aware of the herein suit's existence until 25<sup>th</sup> January 2021 when I stumbled on the Ruling delivered herein on 7<sup>th</sup> April 2020 on Kenya Law's case search engine while researching on a different matter.

7. **THAT** due to the aforesaid it was not possible for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to have instructed their Advocates to enter appearance and/or file a defence as they were not aware of any suit against them.

8. **THAT** the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are desirous of defending the herein suit.

9. **THAT** the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have a reasonable Defence that raises triable issues and thus should be given a chance to defend the herein suit. *Annexed hereto and marked 'LGK-2' is a copy of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Draft Statement of Defence.*

10. **THAT** the Plaintiffs are likely to execute the herein Decree at any time.

11. **THAT** should the Plaintiffs proceed to execute the herein resultant Decree, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants shall suffer irreparably as they will have been condemned unheard.

12. **THAT** the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants seek this Honourable Court's urgent intervention by way of an order of a stay of execution of the herein Judgment and the resultant Decree, as against them, pending the hearing and determination of the Application filed herewith *inter-partes*.

13. **THAT** the Application filed herewith has been filed brought without unreasonable delay.

14. **THAT** it is in the interest of justice that the orders sought in the Application filed herewith be granted.

15. **THAT** I swear this Affidavit in support of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Application that this Honourable Court stays the execution of the herein Judgment and the resultant Decree, as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, pending the outcome of the Application filed herewith and that the herein Judgment be set aside, and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be allowed to file their Defence out of time.

16. **THAT** what is deponed to hereinabove is true to the best of my knowledge, information and belief save where otherwise stated.

4. On **12<sup>th</sup> May, 2021**, counsels for the plaintiff and for 2<sup>nd</sup> and 3<sup>rd</sup> defendants proffered a consent which they asked the court to adopt as its order. The consent reads as follows:

**By consent**, of counsel for the plaintiff and 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, we hereby record a consent as follows:-

**“1.That** the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be and are hereby exempt from the execution of Judgment delivered on **13.10.2020** together with the consequent decree.

**2.That** the application dated **28.1.2021** be marked as heard and determined.”

**Dated at Chuka this 12<sup>th</sup> day of May, 2021.**

**Miss Ambani h/b for Mr. Saluny for 2<sup>nd</sup> & 3<sup>rd</sup> Defendants**

**Wanjiru Njihia for the 1<sup>st</sup> Plaintiff/Respondent**

5. The consent is properly executed.

6. The consent is hereby adopted as an order of this court.

7. Application marked as determined as concerns the 1<sup>st</sup> Plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

8. No costs are awarded.

**DELIVERED IN OPEN COURT AT CHUKA THIS 12TH DAY OF MAY, 2021**

**IN THE PRESENCE OF:**

**CA: Ndegwa**

**Miss Ambani h/b Saluny for 2<sup>nd</sup> and 3<sup>rd</sup> Defendants**

**Wanjiru Njihia for 1<sup>st</sup> Plaintiff/Respondent**

**P. M. NJOROGE,**

**JUDGE.**