



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO. 238 OF 2017

FORMERLY MERU ELC. 60 OF 2014

CHUKA UNIVERSITY.....PLAINTIFF

VERSUS

LUCIA NDURU & 2 OTHERS.....DEFENDANTS

RULING

1.1 This application is dated **30th November, 2017** and the applicant has stated that it is predicated upon order 40 Rule 1, Order 51 Rule (1) of the Civil Procedure Rules 2010; Section 1A, 1B and 3A and Section 63(e) of the Civil Procedure Act and all other enabling provisions of law.

2. The application seeks the following orders:

a) That this application be certified urgent and be heard ex-parte.

b) That this honourable court be pleased to issue a conservatory order maintaining status quo to the effect that, there shall be no further digging, excavating, dumping building materials, wasting, felling of trees, constructing thereon or in any other way dealing with or interfering with the property known as Land Reference No. Marembo/Rianthiga/293 by the defendants, their servants and/or agents pending the inter-partes hearing of this application.

c) That this honourable court be pleased to issue a conservatory order maintaining status quo to the effect that, there shall be no further digging, excavating, dumping building materials, wasting, felling of trees, constructing thereon or in any other way dealing with or interfering with the property known as Land Reference No. Marembo/Rianthiga/293 by the defendants, their servants and/or agents pending the hearing and determination of this suit.

d) That an order of injunction do issue to restrain the defendants, their agents and/or servants from being or remaining or entering upon the suit property known as Land Reference No. Marembo/Rianthiga/293.

e) That costs of this application be provided for.

3. The application has the following grounds:

1. That the applicant is the registered owner/proprietor of Marembo/Rianthiga/293 the suit property measuring 500 acres having obtained the same through donations from the residents of Marembo and Rianthiga sub-location.

2. That the residents of Marembo and Rianthiga sub location donated 15% to become public land where schools, university, hospitals and an airstrip could be built, the applicant through the District Land Adjudication and Settlement Department of the Ministry of Lands facilitated the process and obtained a title number Marembo/Rianthiga/293 for the donated land.

3. That the residents who were living in the suit property were compensated by being given adjacent parcels of land bordering the University land through the District Land Adjudication and Settlement Department of the Ministry of Lands including the defendants herein.

4. That from the foregoing, the applicant is the registered owner and has absolute rights of ownership and their rights and interest are in terms of section 25(1) of the Land Registration Act No. 3 of 2010 are indefeasible.
5. That the applicant further asserts that being the legal registered owner, it has been in continuous possession of the same since the year 2011, when it was issued with a Title Deed in respect to the suit property.
6. That the parcels of land forming the suit property were not developed and not adjudicated, therefore had no land reference numbers prior to the acquisition by the applicant and that the applicant's Title is the first to be registered in Marembo and Rianthiga location.
7. That the defendants herein have illegally settled on a portion of the suit property approximately one (1) (sic), continue to suffer trespass on the suit property and degrade the suit property by cutting down of trees and illegally burning the same for production of charcoal.
8. That the defendants activities have a ripple effect on the adjacent land which includes a river that is facing an imminent dry up and not unless their activities are stopped in time, the suit property will be depleted hence rendering it useless for the beneficiary who is the applicant herein.
9. That the applicant is apprehensive that the defendants have no intention of taking care of the land because they possess no legal right over it and are merely taking advantage by wastefully using the suit property.
10. That the plaintiff/applicant is desirous of developing the suit property it has obtained the requisite blue prints for construction of the University but the same cannot be implemented due to the illegal encroachment by the defendants.
11. That the defendants were allocated parcel Nos. 88, 181, 242, 272, 286 and 316 as compensation for the 15% of land donated by their deceased father which they still occupy and at the same time encroach on the plaintiff's suit property.
12. That at the time of filing this suit there were no permanent structures on the suit property but the defendants without any colour of right have proceeded to construct semi-permanent structures on the said property.
13. That the defendants are benefiting out of the applicant's property against the equitable principle that "***Nemo Debet Locupletari ex aliena jactura***" (No one should be enriched by another's loss).
14. The applicant states that they engaged the services of surveyors to establish the beacons and boundaries of the parcels of land and after the surveyors confirmed the beacons for Land Reference No. Marembo/Rianthiga/293, the applicant fenced the same but the defendants interfered with the beacons and encroached into the suit land herein.
15. That the defendants never recorded any objection before the Land Adjudication Committee in respect of the adjudication register and therefore they cannot be heard to raise any complaint after the adjudication and the settlement was done procedurally. Equity aids the vigilant and (sic) the indolent.
16. That the parcel in dispute which the defendants adamantly claim to be theirs was part of the 15% which their deceased father gave up to form the suit property known as Land Reference Marembo/Rianthiga/293 for the purpose of Construction of Chuka University.
17. That the defendants insist that they are the rightful owners to the disputed parcel of land and (sic) have continued to further trespass and encroach on the applicant's Land Reference No. Marembo/Rianthiga/293 thereby erecting both permanent and semi-permanent structures.
18. That the defendants have denied the plaintiff/applicant access to the disputed parcel of land which is within the suit property thus the defendants unlawful actions have deprived the plaintiff/applicant of its Constitutional Right to property.
19. That the plaintiff/applicant has been deprived of the use and enjoyment of the suit property as a result of the said trespass by the defendants.
20. That the defendants have trespassed on the suit property by erecting structures thereon and that, notwithstanding the plaintiff/applicant's repeated demands, have refused to vacate or deliver possession of the suit property to the plaintiff/applicant.
21. That the applicant deserves to take over management and occupation of their property and develop the same and the failure by the defendants to give vacant possession of the said property is causing untold misery to the applicant as their projects are stalled and they cannot develop the disputed parcel of land within the suit property.

22. That it is in the public domain that illegal encroachment/land grabbing of school property has gained notoriety and/or is rampant and not unless the court moves in to arrest the situation the plaintiff/applicant will be illegally deprived of the use of the suit property.

23. That the plaintiff/applicant has come to this court to protect its Constitutional right to protection of property and it is therefore in the interest of justice that the orders sought in the application herein be granted.

DATED AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2017

BRIAN OTIENO & COMPANY DVOCATES

ADVOCATES FOR THE PLAINTIFF/APPLICANT

4. The application is supported by the Supporting Affidavit of Prof. Stanley M. Kagwanja sworn on 30th November, 2017 which states:

I, PROF. STANLEY M. KAGWANJA a resident of Chuka of care of Post Office Box Number 109-60400 CHUKA in the Republic of Kenya do hereby make oath and state as follows:

1. That I am the Deputy Vic-Chancellor in charge of Administration, Finance, Planning and Development at the Applicant's Institution and well versed with the facts and the matters pertaining to this case with authority to swear this affidavit, and such I am competent to do so on behalf of Chuka University.

2. That I know for a fact that the applicant is the registered owner of Land Reference Number MAREMBO/RIANTHIGA 293 (herein after referred to as "the suit land") located in Tharaka Nithi County having obtained the same through donations from the residents of Marembo and Rianthiga sub location.

(Annexed hereto and marked as "SMK 1" is a true copy of the title deed to the suit land.

3. That I know from my own personal knowledge that the residents of Marembo and Rianthiga sub location donated 15% to become public land where schools, university, hospitals and an airstrip could be built. The plaintiff/applicant through the District Land Adjudication and Settlement Department of the Ministry of Land s facilitated the process and obtained a title number Marembo/Rianthiga/293 for the donated land.

4. That I know for a fact that the applicant acquired the suit land, which measures to 500 acres through unanimous donations from the residents of Marembo and Rianthiga sub-location after a community meeting.

(Annexed hereto and marked "SMK 2" are true copies of various minutes of meetings held between the residents of Marembo/Rianthiga sub location and the university with regards to donation and compensation of the land).

5. That I know from my own personal knowledge that the residents who were living in the suit property were compensated by being given adjacent parcels of land bordering the university land through the District Land Adjudication and Settlement Department of the Ministry of Lands including the defendants herein.

6. That I know for a fact and reasoning form the foregoing, the applicant being the registered owner of the suit property has absolute rights of ownership and their rights and interests are in terms of section 25(1) of the Land Registration Act No. 3 of 2012 are indefeasible.

7. That I know for a fact that the plaintiff/applicant being the legally registered owner of the suit land, has been in continuous possession of the same since the year 2011, when it was issued with a title deed in respect to the suit property.

8. That I know from my own personal knowledge that the parcels of land forming the suit property were not developed and not adjudicated, therefore had no land reference numbers prior to the acquisition by the plaintiff/applicant and that the applicant's title is the first to be registered in Marembo and Rianthiga location.

9. That I know from my own personal knowledge that the defendants herein have illegally settled on a portion of the suit property, continue to further trespass on the suit property and degrade the suit property by cutting down of trees and illegally burning the same for a production of charcoal.

10. That I know from my own personal knowledge that the defendants activities have had a ripple effect on the adjacent land which includes a river that is facing an imminent dry up and not unless their activities are stopped in time, the suit property will be depleted hence rendering it useless for the beneficiary who is the plaintiff/applicant herein.

11. That I know for a fact that the defendants have no intention of taking care of the suit property because they possesses no legal right over it and are merely taking advantage by wastefully using the suit property.

12. That I know from my own personal knowledge that the plaintiff/applicant is desirous of developing the suit property. It has obtained the requisite blue prints for construction of the University but the same cannot be implemented due to the illegal encroachment by the defendants.
 13. That I know for a fact that the defendants were allocated parcel Nos.88, 181, 242, 272, 286 and 316 as compensation for the 15% of land donated by their deceased father which they still occupy and at the same time encroach on the plaintiff's suit property.
 14. That I know for fact that at the time of filing this suit there were no permanent structures on the suit property but the defendants without any colour of right have proceeded to construct semi-permanent structures on the said property.
 15. That I have been duly advised by the able advocates on record for the plaintiff/applicant whose advice I verily believe to be true that the defendants are benefiting out of the plaintiff/applicant's property against the equitable principle that "***Nemo Debet Locupletari ex aliena jactura***" (No one should be enriched by another's loss).
 16. That I know for a fact that the plaintiff/applicant engaged the services of surveyors to establish the beacons and boundaries of the parcels of land and after the surveyors confirmed the beacons for Land Reference No. Marembo/Rianthiga/293, the applicant fenced the same but the defendants interfered with the beacons and encroached into the suit land herein.
 17. That I have been duly advised by the able advocates on record for the plaintiff/applicant whose advise I verily believe to be true that the defendants as required by law, never recorded any objection before the Land Adjudication Committee in respect of the adjudication register and therefore they cannot be heard to raise any complaint after the adjudication and the settlement was done procedurally. Equity aids the vigilant and (sic) the indolent.
 18. That I know for a fact that the parcel of land in dispute which the defendants adamantly claim to be theirs was part of the 15% which their deceased father gave up to form the suit property known as Land Reference Marembo/Rianthiga/293 for purposes of construction of Chuka University.
 19. That I know from my own personal knowledge that the defendants who claim to be the rightful owners to the disputed parcel of land, continue to further trespass and encroach on the plaintiff/applicant's land Reference No. Marembo/Rianthiga/293 thereby erecting both permanent and semi-permanent structures.
 20. That I know for a fact that the defendants have denied the plaintiff/applicant access to the disputed parcel of land which is within the suit property thus the defendants unlawful actions have deprived the plaintiff/applicant of its Constitutional Right to property.
 21. That I know of my own knowledge the plaintiff/applicant has been deprived of the use and enjoyment of the suit property as a result of the said trespass by the defendants.
 22. That I know for a fact that the defendants have trespassed on the suit property by erecting structures thereon and that, notwithstanding the plaintiff/applicant's repeated demands, have refused to vacate or deliver possession of the suit property to the plaintiff/applicant.
- (Annexed herewith and marked as "SMK 3" are true copies of the vacation demands by the applicant and the Ministry of Lands).
23. That the plaintiff/applicant deserves to take over management and occupation of their property and develop the same and the failure by the defendants to give vacant possession of the said property is causing untold misery to the applicant as their projects are stalled and they cannot develop the disputed parcel of land within the suit property.
 24. That I know from my own personal knowledge that it is in the public domain that illegal encroachment/land grabbing of school property has gained notoriety and/or is rampant and not unless the court moves with speed to arrest the situation the plaintiff/applicant will be illegally deprived of the use of the suit property.
 25. That I have been duly advised by the advocate on record for the plaintiff/applicant whose advice I verily believe to be true that on a balance of convenience the applicant being the registered owner of the parcel of land, the court can restrain the defendant from carrying out any act that would defeat the preservation of the suit property.
 26. That I have been duly advised by the advocate on record for the plaintiff/applicant whose advice I verily believe to be true that a temporary injunction may be issued in a suit to preserve property in dispute in the suit or the rights of parties under determination in a suit pending the disposal of the suit in order to preserve the subject matter.
 27. That I have been duly advised by the advocate on record for the plaintiff/applicant whose advice I verily believe to be true that where a person in this case the defendants having built some development on the suit plot, they should remain so with no further development therein.

28. That I have been duly advised by the advocate on record for the plaintiff/applicant whose advice I verily believe to be true that the purpose of an injunction is to conserve the subject property pending the determination of a suit concerning the property. It is usually granted to prevent disposal or alienation and/or to prevent wastage and/or damage of the suit property.

29. That I have been duly advised by the advocate on record for the plaintiff/applicant whose advice I verily believe to be true that the general principle is that where there are serious conflict of facts, the trial court should maintain the status quo until the dispute has been decided in a trial.

30. That applicant prays for the relief sought in order to meet the ends of justice and safeguard the rule of law.

31. That what that is deponed to herein is true to the best of my knowledge, information and belief save where otherwise stated and sources thereof disclosed.

5. The application has been opposed vide the Replying Affidavit sworn by Mutembei Nduru, the 3rd defendant, who swears as follows:

1. That I am a male adult of sound mind, the 3rd defendant/respondent herein thus qualified and competent to make and swear this affidavit on my own behalf and on behalf of my co-defendants/respondents and whose authority I have so to do.

2. That I have read and understood the contents of the plaintiff/applicant's application dated 30.11.2017 together with the supporting affidavit thereto and it is in response thereto that I now make and swear this affidavit.

3. That the prayers being sought for by the plaintiff/applicant in the said application are unmerited and incapable of being granted at this stage of the proceedings as doing so would be against the law.

4. That the plaintiff/applicant is in actual fact seeking for an eviction order against the defendants/respondents but which in the said application is disguised as an order of injunction.

5. That I and my co-defendants/respondents are not trespassers upon the plaintiff/applicant's land parcel No. MAREMBO/RIANTHANGU/293 as being alleged or at all and neither have I and my co-defendants respondents illegally entered into or encroached into the plaintiff/applicant's land parcel as being alleged or at all.

6. That the contents of the supporting affidavit, sworn by one Prof. STANLEY M. KAGWANJA and filed alongside the said application is full of falsehood and distortion of facts aimed at misleading this honourable court and the same should be rejected.

7. That it is not true, as being alleged, that our deceased father donated land to the plaintiff/applicant as alleged or at all and neither is it true that our deceased father was offered and/or compensated with another land parcel for his land as alleged or at all and the said allegations are untruthful and intended to mislead the court.

8. That our deceased father, one SAVERIO NDURU MUGIRA (deceased), was and still is the bonafide and legitimate owner of that land parcel known and/or described as plot No. 242 MAREMBO/RIANTHIGA ADJUDICATION SECTION which is ancestral land inherited by our father from our grandfather.

9. That I and my co-defendants/respondents were born and brought up on the said land parcel as was my deceased father who was similarly born and brought up on the said land parcel and upon demise his, remains were interred on the said land parcel.

10. That the family has been in actual ownership, possession and use of the said land parcel for ages, going through various generational inheritance and that I and my co-defendants/respondents are presently and legitimately in actual ownership, possession, occupation and use of the said land parcel having inherited the same from our deceased father.

11. That in the longevity of our possession and occupation, the said land parcel has over the years been extensively developed and improved by construction of several houses thereon and undertaking of various other projects and developments thereon over a period of time and it is not true, as being alleged by the plaintiff/applicant, that houses are being constructed on the said land parcel at the moment by myself or any of my co-defendants/respondents herein.

12. That some of the houses that are on the said land parcel were built by our forefathers, even before we were born and others have subsequently been built thereon during our time but no new construction is presently in progress on the said land parcel as being alleged by the plaintiff/applicant in his affidavit or at all.

13. That it should be clarified herein that, the said land parcel referenced as PLOT NO. 242 MEREMBO/RIANTHIGA ADJUDICATION SECTION exclusively belongs to our deceased father, one SAVERIO NDURU MUGIRA and the same has never been the property of the plaintiff/applicant and neither is it part of the plaintiff/applicant's land parcel No. MAREMBO/RIANTHIGA/293 as alleged or at all.

14. That as earlier stated, my deceased father was the bonafide and legitimate owner of the said land parcel No. 242 MAREMBO/RIANTHIGA ADJUDICATION SECTION, measuring approximately 30 acres and that the same was never part of the land donated by the community to the plaintiff/applicant as being alleged or at all.

15. That the plaintiff/applicant has just recently unlawfully and illegally caused our said land parcel No. 242 MAREMBO/RIANTHIGA ADJUDICATION SECTION to be illegally merged and/or annexed into and/or as part of its land parcel No. Marembo/Rianthiga/293 and has been threatening to evict me and my co-defendants/respondents from the said land parcel while fully aware that our deceased father never donated land to the plaintiff/applicant herein and neither was he (our deceased father) compensation (sic) for any land as being alleged or at all.

16. That it is a known fact, and it has been pleaded in the suit herein, that the merging or annexing of our land parcel No. 242 MAREMBO/RIANTHIGA ADJUDICATION SECTION into and/ or as part of the plaintiff/applicant's land parcel No. MAREMBO/RIANTHIGA/293 was done fraudulently, illegally, unprocedurally and unlawfully as our deceased father's consent or permission was never sought for or obtained and neither was our deceased father compensated for the said land as per the requirements of the law that provides for compulsory acquisition of land or property.

17. That I and my co-plaintiffs/respondents have been in actual ownership, possession occupation and use of the said 30 acres of land referenced as PLOT NO. 242 MAREMBO/RIANTHIGA ADJUDICATION SECTION and the plaintiff/applicant has never at any given point in time been in actual possession, occupation or use of the said portion and the allegations contained in the supporting affidavit filed alongside the application dated 30.11.2017 are false, deceitful, dishonest and misleading.

18. That in view of the above, it follows that the orders being sought for by the plaintiff/applicant vide the application dated 30.11.2017 are incapable of being granted as doing so will be against the law and will occasion me and my co-defendant/respondent together with our families to undergo untold suffering and hardship and we stand to suffer irreparable damage.

19. That the orders being sought for by the plaintiff/applicant vide the application dated 30.11.2017 have an effect of evicting me and my co-defendant/respondent and our families from our ancestral land, and although the same have been disguised as injunctive orders, their effect, if granted, will go against the law and as such the same should not be granted.

20. That the facts, nature and circumstances of this case are not in favour of granting of the orders being sought for by the plaintiff/applicant vide the application dated 30.11.2017.

21. That I now make and swear this affidavit in opposition to the plaintiff/applicant's application dated 30.11.2017.

6. Parties canvassed this application by way of written submissions. The defendants have filed a defence denying the plaintiff's claim that they have encroached or trespassed into the plaintiff's land. They have also filed a counter-claim seeking cancellation of the plaintiff's/applicant's title for Land Parcel No. MAREMBO/RIANTHIGA/293 or for rectification of the records thereof so as to exclude land parcel No. 242 MAREMBO/RIANTHIGA/ADJUDICATION SECTION from the plaintiff/applicant's alleged land parcel and to reinstate it as a separate parcel of land.

7. The parties' submissions contain diametrically opposed assertions which are by and large in congruence with the affidavits they have filed in support of their positions.

8. When dealing with interlocutory applications we do not need to reinvent the wheel. The Court of Appeal in the classic case of *Mbuthia Versus Jimba Credit Corporation and Another [1988 KLRJ]* eruditely opined as follows:

“The correct approach in dealing with an application for an injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. There is no doubt in my mind that the learned Judge went far beyond his proper duties, and has made final findings of fact on disputed affidavits.”

I do not wish to make such a mistake.

9. I opine that the cases cited by the plaintiff are good authorities in their circumstances. However, no one case can be congruent in facts and circumstances, to a mathematical certitude *vis-a-vis* another.

10. I find it necessary to issue the following orders:

1. The parties, their advocates, the District Land Adjudication and Settlement Officer (DLASO) in charge of MAREMBO/RIANTHIGA ADJUDICATION SECTION and this court's Chief Executive Officer to visit the site where the disputed parcel or parcels are situated **AND** to give a report to court within 30 days of today which report will highlight:

a) The present status of the suit land including occupation, natural features such as rivers, trees and cultivation.

b) For the DLASO, especially, he will give details concerning how the land came to be in the ownership of the litigants and clarify if and how the defendants were compensated by way of allocation of alternative land.

c) Any other material facts.

11. Further directions regarding the definitive disposal of this application will be given on 16th April, 2018 or on any other day convenient to the parties to be agreed upon on 6th March, 2018 but not beyond the 30th of April, 2018.

12. Interim orders are extended in terms of the provisions of section 63, CPA.

13. In the interim, costs of the visit, eventually to be in the cause, to be funded by the Plaintiff/Applicant.

14. It is so ordered.

Delivered in open court at Chuka this **6th day of March, 2018** in the presence of :

CA: Ndegwa

Brian Otieno for the Applicant

Lucia Nduru – 1st defendant

Mutembei Nduru – 3rd defendant

P. M. NJOROGE

JUDGE