



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CHUKA ELC CASE NO. 65 OF 2017

(FORMERLY MERU ELC CASE NO. 197 OF 2016)

PETER KABETE M'NKANYAUGA.....PLAINTIFF

VERSUS

JACOB MUTEGI MWATHI.....DEFENDANT

RULING

1. This ruling concerns an application dated 31st November, 2016 filed by the plaintiff. The determination of this ruling will also affect the status of the main suit. The application seeks orders:

1. That this honorable court be pleased to certify this application as extremely urgent, service to be dispensed with and the same be heard ex-parte in the first instance.

2. That this honorable court be pleased to issue orders of injunction restraining the Defendant, his agents, servants assigns or employees or anyone acting at their behest from interfering or entering the Plaintiffs land pending hearing and determination of this suit.

3. That status quo be maintained as prior to the institution of this suit.

4. That this honorable court be pleased to issue such further orders to meet the end of justice.

5. That the costs of this application be provide for.

2. The application is supported by the affidavit of **PETER KABETE M'NKANYAUGA**, the plaintiff and has the following grounds:

a) That the Plaintiff is the bona fide owner of all that parcel of land situated at Kathangichiri location bordering the Defendant's land.

b) That if the orders sought herein are not granted the Plaintiff/Applicant will suffer irreparable loss and damage.

3. The application was heard interpartes on 28.2.2017.

4. The plaintiff told the court that the defendant had trespassed on his land in August, 2010 and had refused to move out. For this reason, he sought orders as prayed in the application.

5. The defendant denied that he had trespassed upon the plaintiff's land. He told the court that he had lived on the disputed land since birth. He said that the plaintiff and his father lived peacefully as neighbours until after his father died when the plaintiff started claiming the disputed land.
6. The defendant told the court that this dispute had been heard and settled by the sub chief and the chief and each party was shown apposite boundaries.
7. The defendant told the court that he was surprised that the plaintiff had filed this suit. He asked the court not to grant the prayers sought by the plaintiff and to dismiss the suit.
8. The plaintiff told the court that the land he is claiming was unadjudicated land. He told the court that he did not know if the **NTHUNGU YA ATHANGATHA** area had been declared an adjudication section.
9. The defendant told the court that after the suit was filed, it was not served upon him. He denied entering an appearance and filing a defence. He said that he never went to school and could not, therefore have signed the 2 documents.
10. The defendant told the court that he only came to court because he had received the court's notice.
11. The plaintiff told the court that he had served the suit documents upon the defendant through a clerk he could not identify. I note that no affidavit of service was filed. I, therefore, find that the defendant was not served. I also find that the Memorandum of Appearance and the Defence purportedly signed by the defendant are suspicious. It is noted that the 2 documents have as signatures the initial "JM" which can easily be inserted by any person.
12. Based on the evidence tendered by the parties, I am inclined to believe the defendant's version. In an application for an interlocutory injunction, I need not reinvent the wheel. The Court of Appeal in the case of *Mbuthia Versus Jimba Credit Corporation [1988] KLR I* gave erudite guidance in this area and opined as follows:

"The correct approach, in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. The lower court Judge in this case had gone far beyond his proper duties and made final findings of fact on disputed affidavits."
13. The veracity of the supporting affidavit and the pleadings filed by the plaintiff has been put into question. Weighing up the relevant strength of the respective propositions, I find that the defendant's propositions more compelling. The orders sought in the application are denied and the application is dismissed.
14. I do not find the need for this suit to proceed to hearing. The plaintiff has categorically told the court that this dispute concerns unadjudicated land.
15. In his plaint, the plaintiff prays that Judgment be entered against the defendant that:
 - a) The plaintiff be declared the proprietor of all that parcel of land located at Kathangariri and consequently order the defendant to grant the plaintiff vacant possession of his subject parcel.
 - b) Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.
 - c) Any such other or further relief as this Honourable Court may deem appropriate.
16. In other words the plaintiff is seeking orders that a parcel of land whose area is undefined and whose tenure is unrevealed be declared his private land.

17. Article 61(2) of the Constitution of Kenya classifies land as public, community or private.

18. Article 64 of the Constitution of Kenya decrees that private land consists of:

- a) Registered land held by any person under a freehold tenure;
- b) Land held by any person under leasehold tenure;
- c) Any other land declared private land under an Act of Parliament.

19. I opine that the land claimed by the plaintiff does not fall under the ambit of the 3 categories pellucidly delineated by the Constitution. In a more direct statement, unadjudicated land, unless it is subjected to a process leading to a known tenure is not recognized under the 3 categories of private land recognized by the Supreme law of the land.

20. The Land Adjudication Act provides a procedure for ascertainment and recording of rights and interests in Trust Land.

21. The Land Consolidation Act provides for the ascertainment of rights and interests in, and for Consolidation of Land in the special areas. It also provides for registration of title and of transactions and devolution affecting such land and other land in special areas.

22. It is veritably pellucid that the plaintiff does not claim that his land has been subjected to the processes contemplated by either the Land Adjudication Act or the Land Consolidation Act.

23. As determined in *Meru ELC No. 198 of 2016, eKLR, M'ITHANA M'THIRINGA VERSUS MURITHI M'AMBURUBUA*, this court has no jurisdiction to usurp the powers of institutions created by the Land Adjudication Act and the Land Consolidation Act, which are creatures of the legislature. As this court opined in the above cited case;

“If the court attempts to do so, this would render the concerned institutions superfluous and as dead as dodos. This can never be the intention of the law.”

24. The Supreme Court of Kenya in *Civil Application No. 2 of 2012 (SK Macharia & Another Versus KCB & 2 Others* gave guidance on the area of Jurisdiction. It stated as follows:

“A Court’s Jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the 1st and 2nd respondents in his submissions that the issues as to whether a court of law had jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.....”

25. In the Classic Case of “The MV Lilian “S”, [1989] KLR I, Court of Appeal, Justice Nyarangi, JA, opined as follows:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

26. I find that this court has no jurisdiction to handle matters concerning unadjudicated land unless when dealing with questions concerning the integrity of the adjudication process.

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

1. This application is dismissed.
2. This suit is dismissed in its entirety.
3. No costs are awarded.

28. It is so ordered.

Delivered in open court at Chuka this 7th day of **March, 2017** in the presence of:

CA: Ndegwa

Jacob Mutegi Mwathi – defendant

Plaintiff – absent

P.M NJOROGE

JUDGE