



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO. 01 OF 2020

GILBERT GITARI BORE.....1ST PLAINTIFF

OMARI MARIJAN OMARI.....2ND PLAINTIFF

VERSUS

KENYA URBAN ROADS AUTHORITY.....1ST DEFENDANT

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

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

HYPER CONSTRUCTIONS & EQUIPMENT COMPANY LTD.....4TH DEFENDANT

JUDGMENT

1. This suit was slated to be heard on **6th October, 2020**. However, this date conflicted with the date of a 3 bench matter, this judge was to hear as Presiding Judge with two other Judges at Meru. It was directed that the matter be heard on 12th October, 2020 and the plaintiff was ordered to serve this hearing date upon the defendants.

2. In their plaint the plaintiffs seek the following orders jointly and severally against the defendants:

a) A declaration that the plaintiffs are the owners of Plots No. 223 Chuka Township and Plot No. 225 Chuka Township respectively and that the said plots are not on any road reserve let alone “Moi Girls” Road.

b) A permanent injunction against the 1st and 4th defendants, their servants, agents, assignees or any person acting on their behest from in any manner demolishing, damaging or interfering with the general user of the plaintiffs’ Plot No. 223 and Plot No. 225 Chuka Township.

c) Cost and interest from the date of judgment.

3. I reproduce in full a ruling which was delivered by this court on **7th April, 2020** as the orders contained therein are relevant to this case.

RULING

1. This application is dated **1st April, 2020** and seeks the following orders:-

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

2.That the respondents’ either by themselves, their servants, agents or any person acting on their behest be restrained by way of an interim injunction from demolishing, damaging ,Alienating or interfering with the general user in any manner of Plots No. 223 and PLOT NO 225 Chuka Township situated in Chuka Town pending the hearing and determination of the instant application.

3.That the respondents’ either, by themselves, their servants, agents or any person acting on their behest be restrained by way of an

interim injunction from demolishing, damaging, Alienating or interfering with the general user in any manner of plots no. 223 and PLOT NO. 225 CHUKA TOWNSHIP situated in chuka town pending the hearing and determination of the main suit herein.

4.That the court be pleased to order the survey of Kenya to conduct an independent survey to establish and determine the actual boundaries and perimeters of “MOI GIRLS” road vis-a-vis PLOTS NO. 223 and plot NO.225 CHUKA TOWNSHIP situated in Chuka Town and the survey be conducted as per the existing national map regarding CHUKA TOWN ROADS AND PLOTS .

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

6.Cost of this application be provided for.

2. The application has the following grounds:-

a) That the 1st plaintiff and the father of the 2nd plaintiff are the owners of PLOTS NO. 223 and PLOT NO 225 chuka township respectively and they has been paying land rates to the 2nd defendant /respondent who collects the same for and on behalf of the 3rd respondent .

b) That PLOTS NO. 223 and plot NO.225 Chuka Township measurements are clearly set out in PDP. F/R.NO 230/171 FOLIO NO 253, coordinates and lease documents and they all measure 30 feet by 120 feet each.

c) That PLOT NO. 223 and PLOT NO.225 chuka township are not on any road reserve let alone “Moi Girls” road.

d) That on 19th February 2020 the applicants were served with notices to demolish parts of their Plots No 223 and plot No.225 Chuka Township by the 1st and 4th respondent.

e) That further the 1st respondent went on to mark the extent to which the applicants’ plot should be demolished within a period of 14 days with effect from 19th February 2020 and the 14 days expired on 3rd March 2020 making the instant application necessary and urgent.

f) On 30th March 2020, the 4th defendant , Hyper Constructors and Equipments Company Limited threatened to demolish the plaintiffs plots and other adjacent plots namely;M.26B,M.26.A2,M.25,M.19,M.20B,M.23 and M.27B CHUKA TOWNSHIP.

g) That the applicants have invested heavily on their plots by constructing commercial buildings.

h) That in the event that the 1st and 4th respondents are not stopped from putting into effect their threats and demands as contained in their notice dated 18th February 2020 the applicants stands to suffer irreparable loss and damages and in particular having their lifetime investments demolished or damaged .

i) That the 1st respondents notice and intentions are clearly in contravention of the applicant’s constitutional rights to own property as enshrined under article 40 3(A) of the constitution of Kenya -2010.

j) That the intended action by the 1st respondent is equally in contravention of article 64 of the constitution of Kenya which deals with ownership of private property.

k) That the 1ST respondent has totally fallen in error by holding that the applicants’ plot aforesaid is on the road reserve when from the PDP held by the 2nd respondent and from the survey of Kenya –Nairobi clearly show that the applicants’ plot has not in any way encroached into any road reserve let alone the projected “Moi Girls”road.

l) That the applicants have been dutifully paying rents and rates to the 2nd respondent on behalf of the 3rd respondent.

m) That PLOT NO.223 and PLOT NO.225 chuka township which are the properties of the 1st and the 2nd plaintiffs respectively have leases certificates ,letter of allotment, PDP and co-ordinates showing the parameters and extent of the two plots.

n) That to clear the heirs regarding the canvassed issues in this application there is need for the survey of Kenya to conduct an independent survey regarding the position on the ground of the applicants’ plot Vis-A-Vis the projected “Moi Girls” road.

3. The application is supported by the affidavit of Gilbert Gitari Bore, the 1st plaintiff which states as follows:-

1.That I am the 1st plaintiff/applicant herein well versed with the particulars of this case and hence competent to make this oath.

2.That I have authority from the 2nd applicant herein to swear this oath on his behalf and on my behalf.

3.That I am the owner of PLOT NO. 223 Chuka Township and I have been paying land rates to the 2nd defendant /respondent who collects the same for and on behalf of the 3rd respondent .(ANNEXED AND MARKED GGB1 IS THE GRANT)

4. That the 2nd plaintiff/applicant is the father of the late MARIJANI OMARI the registered owner of plot NO. 225 chuka township (ANNEXED AND MARKED GGB1 i , ii, iii ARE THE ALLOTMENT LETTER, LEASE CERTIFICATE AND PDP OF PLOT NO.225)

5. That PLOT NO. 223 and plot NO.225 chuka township measurements are clearly set out in the lease certificate and co-ordinates and allotment letter and they are 30 feet by 120 feet each. (ANNEXED AND MARKED GGB2 IS THE CO-ORDINATES OF PLOT NO.223 .

6. That PLOT NO. 223 and plot NO.225 chuka township are not on any road reserve let alone “Moi Girls” road.

7. That on 19th February 2020 the applicants were served with notices to demolish parts of their Plots No 223 and plot No.225 Chuka Township by the 1st respondent and 4th respondent. (ANNEXED AND MARKED GGB3 IS A NOTICE LETTER TO DEMOLISH THE PLAINTIFFS’ PLOT)

8. That further the 1st respondent went on to mark the extent to which the applicants’ plots should be demolished within a period of 14 days with effect from 19th February 2020 and the 14 days expired on 3rd March 2020 making the instant application urgent.

9. On 30th March 2020, the 4th defendant -HYPER CONSTRUCTORS AND EQUIPMENTS COMPANY LIMITED at the instant of the 1st defendant/respondent threatened to demolish the plaintiffs plots and other adjacent plots namely; M.26B, M.26.A2, M.25, M.19, M.20B, M.23 and M.27B CHUKA TOWNSHIP and the situation was saved by production of map from the survey of Kenya. (ANNEXED AND MARKED GGB4 IS PDP F/R.NO 230/171 FOLIO NO 253 FROM THE SURVEY OF KENYA-NAIROBI WHICH CLEARLY SHOWS THE PARAMETERS OF PLOTS NO.223 AND 225 CHUKA TOWNSHIP)

10. That the applicants have invested heavily on their plots by constructing commercial buildings.

11. That in the event that the 1st and 4th respondents are not stopped from putting into effect their demands as contained in their notices dated 18th February 2020 the applicants stand to suffer irreparable loss and damages and in particular having their lifetime investments demolished, damaged or destroyed .

12. That the 1st and 4th respondents’ notice and intentions are clearly in contravention of the applicant’s constitutional rights to own property as enshrined under article 40 3(A) of the constitution of Kenya -2010.

13. That the intended action by the 1st and 4th respondent is equally in contravention of article 64 of the constitution of Kenya which deals with ownership of private property.

14. That the 1ST respondent has totally fallen in error by holding that the applicants’ plot aforesaid are on the road reserve when from the PDP held by the survey of Kenya –Nairobi headquarters clearly show that the applicants’ plots have not in any way encroached into any road reserve let alone the projected “Moi Girls” road.

15. That the applicants have been dutifully paying rents and rates to the 2nd respondent on behalf of the 3rd respondent.

16. That PLOT NO.223 chuka township which is the property of GILBERT GITARI BORE has a lease certificate and co-ordinates showing the parameter of the plaintiffs’ plot while plot no 225 belonging to the late MARIJANI OMARI has a lease certificate and allotment letter.

17. That to clear the heirs regarding the canvassed issues in this application there is need for the survey of Kenya to conduct an independent survey regarding the position on the ground of the applicants’ plots Vis-A-Vis the projected “Moi Girls” road.

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

4. When the application came up for hearing on **7th April, 2020**, Mr. I. C. Mugo the plaintiffs’ advocate told the court that prayers 2 and 3 had already been spent because the defendants had already demolished the plots which were the subjects of this suit. He asked the court to grant prayer No. 4 so that it could be determined if or if not the subject plots encroached the road as alleged by the defendants. He said that the plots were allocated to the defendants in 1950’s and 1960’s and had leases AND all this time the 2nd and 3rd defendants or their predecessors were collecting rates from the plaintiffs.

5. Having considered all pertinent issues, I find it merited to grant prayer 4 because if the actual boundaries are established, it may not be necessary to escalate this suit further. I do note that although the 1st defendant and the 4th defendant were served with this application, they did not come to court. I therefore deem this application as having been heard and determined in absence of the 1st and 4th defendants who did not come to court although they were aware of today’s proceedings.

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

1. Prayers No. 4 and 5 in this application are granted.

2. At this interlocutory stage costs for establishing the boundaries of plot numbers 223 and 225, Chuka Township shall be met by the plaintiffs although eventually those costs shall be in the cause.

3. The plaintiffs to fully comply with order 11, CPR within 21 days of today and the defendants to do so within 21 days after receipt of the plaintiffs' compliance documents.

4. Hearing of the main suit to take place on 6th October, 2020.

5. Orders issued by this court today to be served upon the defendants within 10 days of today.

7. It is so ordered.

Delivered in open Court at Chuka this **07th day of April, 2020** in the presence of:

CA: Ndegwa

IC Mugo for the plaintiffs

P. M. NJORGE,

JUDGE.

4. Having satisfied myself that the defendants had been duly served with today's hearing date, I allow the oral application by the plaintiffs' advocate that the hearing should proceed exparte.

5. The plaintiffs' advocate told the court that he was relying on the plaint, the Case Summary dated **27.4.2020**, documents referred to in the list of documents dated **27.4.2020**, the 1st Plaintiff's witness statement dated **27.4.2020**, and the Chuka National Sub-County surveyor's report dated

13th May, 2020 which was categorical that plots 223 and 225 were at one time resurveyed using coordinates provided on FR.NO.268/168 and that they do not fall under the road reserve as per FR.253/67.

6. Mr. I.C. Mugo, the plaintiffs' advocate told the court that with the unequivocal finding in the surveyor's report, the plaintiffs had proved their case. He asked the court to deliver Judgment in favour of the plaintiffs and to award costs to the plaintiffs.

7. Upon consideration of the evidence proffered by the plaintiffs and in particular the Chuka National Sub County surveyor's report dated **13th May, 2020**, I find that the plaintiffs have proved their case against the defendants.

8. In the circumstances, judgment is entered for the plaintiffs against the defendants in the following terms:

a) A declaration is hereby issued that the plaintiffs are the owners of PLOT NO. 223 CHUKA TOWNSHIP AND PLOT NO. 225 CHUKA TOWNSHIP respectively and that the said plots are not on any road reserve let alone "MOI GIRLS" Road.

b) A permanent injunction is hereby issued against all the defendants, their servants, agents assignees or any person acting on their behalf from in any manner demolishing, damaging or interfering with the general use of the plaintiffs Plot No. 223 and Plot No. 225, Chuka Township.

c) Costs are awarded to the plaintiffs against all the defendants.

Delivered in open Court at Chuka this **13th day of October, 2020** in the presence of:

CA: Ndegwa

Kimathi Kiara h/b I. C. Mugo for the plaintiffs

Defendants absent

P. M. NJORGE,

JUDGE.