



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 02 OF 2019

**NJIRU MICHENI NTHIGA (SUIING AS A
LEGAL REPRESENTATIVE AND
ADMINISTRATOR OF THE ESTATE
OF THE DECEASED LEONARD R.I. NTHIGA).....PLAINTIFF**

VERSUS

**THE GOVERNOR, THARAKA NITHI
COUNTY GOVERNMENT.....1ST DEFENDANT
COUNTY GOVERNMENT OF THARAKA NITHI.....2ND DEFENDANT
THE MEMBER OF COUNTY
ASSEMBLY, MAGUMONI WARD.....3RD DEFENDANT
THE CHIEF OFFICER, ROADS AND
INFRASTRUCTURE THARAKA NITHI COUNTY.....4TH DEFENDANT
THE CHIEF OFFICER, LANDS, PHYSICAL
PLANNING AND URBAN DEVELOPMENT
THARAKA NITHI COUNTY.....5TH DEFENDANT
WESTOMAXX INVESTMENT LTD.....6TH DEFENDANT**

RULING

1. This ruling concerns determination of if or if not the 3rd defendant should continue to be involved in this suit. In the original plaint which was filed on **27th February, 2019**, the 3rd defendant was indicated to be the Member of County Assembly (Magumoni Ward). An issue arose as to whether there could be a legal person under that name. His name was included subsequently and the 3rd defendant now is Justine Kithinji Stanley Nderi, The Member of County Assembly, Magumoni Ward.
2. On **10th July, 2019**, Mr. Duncan Mwitii, told the court that the 3rd defendant was being investigated by the Directorate of Criminal Investigations regarding the same issues which were being litigated in this suit. He felt that the plaintiff should not be allowed to simultaneously follow two Judicial processes: Civil and Criminal. He asked that his name be removed from these proceedings.
3. The court advised the advocate to file an affidavit to explain the apposite issues.
4. On **22nd July, 2019**, the 3rd defendant filed an affidavit which reads as follows:

3RD DEFENDANT'S AFFIDAVIT

I, JUSTIN KITHINJI S. NDERI a resident Kibugua Market in Tharaka Nithi County within the Republic of Kenya and of P. O. Box 10 Magumoni do solemnly make oath and state as follows:-

1. That I am an adult male of sound mind and disposition, a citizen of the Republic of Kenya, the 3rd defendant herein well versed with the facts of this case and hence competent to make the following declarations under oath.
2. That the plaintiff herein made a complaint of malicious damage of property against me and other people working with the Tharaka Nithi County Executive at Chuka Police Station vide OB. 47/11/2/2019 in February, 2019.
3. That the criminal complaint against me and the others relates to and is founded on the events that precipitated the present civil suit.
4. That I was summoned sometimes in June, 2019 by the OCS and the DCIO Chuka Police Station and a statement with regard to the criminal complaint was taken.
5. That at the time of recording the statement I was informed that the complainant had resuscitated the complaint which he had seemingly lost interest in and other people including police officers and officers from the County Planning Officers had also recorded statements.
6. That after the last court attendance on the 10th July, 2019 the court having directed that we furnish it with particulars of the criminal complaint against me I visited the office of the DCIO Chuka who furnished me with details of the same but directed that the actual documents would be delivered to court subject to a court order.
7. That I am now aware that the investigation file was forwarded to the Office of Director of Public Prosecution (ODPP) in Nairobi on the 17th June, 2019 vide letter Ref. DCI/CRI/6/7/VOL.IV/44.
8. That the office of the DCIO Chuka Police Station is awaiting the go-ahead from the ODPP to arrest any culpable individuals including me if there is probable cause to prosecute for malicious damage of property.
9. That it is factual that the complainant's visit to the Chuka Police Station after the court had advised on alternative dispute resolution (ADR) caused the investigation file to be forwarded to the ODPP for advice on prosecution.
10. That it is clear that the complainant's fresh impetus to follow upon on the criminal aspects of this case at a time when ADR is being explored is a well calculated move to influence any form of settlement and also amounts to abuse of court process.
11. That while nothing in law bars parallel criminal and civil proceedings, the use of one process to cause interference with the other or influence the outcome of the other amounts to abuse of court process that this court should not countenance.
12. That as was recorded in my statement with the DCIO, I was not within the confines of Tharaka Nithi County when demolitions, which were allegedly done under the supervisions of police officers and with lawful notice were carried out.
13. That I make this affidavit in support of my application to have my name expunged from the named defendants in the present civil case that relates to the issues of compulsory acquisition of private land, repossession of public land and compensation, matters that a private citizen is not ordinarily answerable to leave alone a member of a County Assembly.
14. That whatever is deposed to herein is true to the best of my knowledge, information and belief.

5. The plaintiff's response to the 3rd defendant's affidavit was filed on **30th July, 2019**. It reads as follows:

REPLY to the 3rd defendant's affidavit dated 16th July, 2019 and filed on 22nd July, 2019

TAKE NOTICE that the plaintiff's counsel will reply and /or oppose to the 3rd defendant's affidavit filed on 22nd July, 2019, on the following grounds:-

1. That the 3rd defendant's affidavit filed on 22nd July, 2019 is incompetent and time-barred as it was filed outside the time frame as directed by this honourable court on 10th July, 2019. We pray that it be expunged from the court's records.
2. That further, the 3rd defendant's affidavit filed on 22nd July, 2019 outside the time frame as directed by this honorable court, on 10th July, 2019 discloses no reasonable cause of action and deserves to be struck out from court's records for being frivolous, vexatious and a gross abuse of court process.
3. That the plaintiff legitimately lodged a complaint and / or reported the 3rd defendant's heinous act to the police on 11.2.2019, long before instituting the civil suit herein, and he is not in any way in control of the investigation and prosecution processes as the same lie with the offices of the National Police Service and the Director of Public prosecutions and this could not have barred him from

filing the instant suit as per the dictates of section 193(A) of the Criminal Procedure Code which vindicates the plaintiff.

4. That as it is rightly admitted by the 3rd defendant in his affidavit on paragraph 11, nothing bars litigants from lodging civil and criminal complaints concurrently as dictated under section 193(A) of the Criminal Procedure Code.

5. That the 3rd defendant has not filed any defence to the plaintiff's claim and as such the plaintiff's claim stands uncontested and the plaintiff is entitled to all the prayers sought out on the amended plaint filed on 1st April, 2019.

6. That the plaintiff shall rely on case of Diamond Hasham Lalji & Another –vs- Attorney General & 4 Others (2018) eKLR.

6. I note that the plaintiff and the 3rd defendant agree that Civil and Criminal proceedings can be executed simultaneously against a litigant. This is the correct legal position. It is only where there is an ulterior motive that this may be frowned upon. At this stage in the proceedings, this court cannot pronounce itself in this area. It may, however, be desirable to conclude one process before embarking on the other.

7. I note that the 2nd, 4th, 5th and 6th defendants have a clear nexus with the 1st defendant, the Governor of Tharaka Nithi County. However, in the way the 3rd defendant is sued no nexus with the County Assembly of Tharaka Nithi County is evinced. It is clear that the County Assembly has not been sued. In this case, it is clearly deducible that the 3rd defendant is sued in his personal capacity.

8. The prayers sought in the plaint read as follows:

The plaintiff prays for judgment against the defendants (1-6) jointly and severally for:

a) Special damages as pleaded on paragraph 12 (v), (vi) and (vii) above.

b) General damages as pleaded on paragraph 12 (i), (ii), (iii) and (iv) above.

c) The defendants (1-6) jointly and/or severally be compelled to restore LR. Magumoni/Thuita/779 in its original status as appearing on the registry index Map (R.I.M) of Magumoni/Thuita registration section, sheet No. 12 and further the defendants (1-6) be issued with permanent orders of injunction restraining them from ever trespassing upto the plaintiff's deceased father's LR. Magumoni/Thuita/779 and/or in the alternative and without prejudice to the foregoing the defendants (1-6) jointly and/or severally be compelled by this honourable court to compensate the plaintiff with a reasonable compensation of the said land parcel and all the developments that were erected thereon prior to the illegal demolitions. (Valuation report to be filed).

d) Costs of the suit.

e) Any other and better relief appropriate in the circumstances.

9. The dominant prayer is No. (c). I opine that except for an injunction restraining the defendants from trespassing on the suit land, the other parts of the prayer concern the 1st, 2nd, 4th, 5th and 6th defendants. These parts, if the plaintiff wins his case, cannot be implemented by the 3rd defendant. It is, therefore, my finding that the 3rd defendant's continued participation in this suit is veritably pyrrhic and his removal from the suit will not, in any meaningful manner, prejudice the plaintiff. The 3rd defendant should, however, not in any way interfere with the substratum of this suit.

10. I issue the following orders:

a) The 3rd defendant is hereby removed from this suit.

b) No costs are awarded to any of the parties in respect of the removal of the 3rd defendant from this suit.

Delivered in open Court at Chuka this 31st day of July, 2019 in the presence of:

CA: Ndegwa

Kirimi Muturi for the plaintiff

Linus Ndungu for the 1st, 2nd, 4th, 5th and 6th defendants

Duncan Mwiti for the 3rd defendant.

P.M. NJOROGI

JUDGE