



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 16 OF 2019

CHUKA IGAMBA NG'OMBE DEVELOPMENT ASSOCIATION.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF THARAKA NITHI.....DEFENDANT

RULING

1. This ruling concerns the plaintiff's application dated 23rd July, 2019. To put matters into their proper perspective, this court's ruling delivered on 23rd July, 2019 is reproduced hereby.

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RULING

1. This application is dated 23rd July, 2019 and is brought to court under Order 40 Rules 1 and 4(1), of the Civil Procedure Rules, Sections 3A and 63 (c) of the Civil Procedure Act, Cap. 21 Laws of Kenya, Articles 22 (b), (c) and (d), 23, 40, 159 2 (a), (b), (d) and (e) of the Constitution of Kenya, 2010, and all other enabling provisions of the law.

2. The application seeks the following orders:-

1. THAT this application be certified urgent, service be dispensed with and the same be heard *ex parte* in the first instance for the interim orders sought.

2. THAT pending interpartes hearing of the application herein this Honorable Court be pleased to issue interim Injunction orders restraining the Defendant herein either by themselves, their servants, agents proxies or by anybody whomsoever acting at their behest from in any manner whatsoever interfering with the Centenary Celebrations Monument erected at Chuka town, adjacent to the Gulf Petrol Station, the developments thereof and the

grounds within which it is erected.

3. THAT pending hearing and determination of the application herein this Honorable Court do grant such other others (sic) as it may deem fit, expedient and justifiable in the circumstances and in the interest of the rule of law and justice.

4. THAT the costs of this application be provided for.

3. The application has got the following grounds:

1. THAT the Centenary Celebrations Monument at Chuka town was initiated and erected by the Chuka Igamba Ng'ombe Development Association courtesy of/vide the Chuka Town Centenary Celebrations Committee. (Annexed hereto and marked "CIDA 1 (A), (B), (C), (D), (E) & (F) are copies of minutes for meetings for initiation and implementation of the plans for the erection/construction of the said monument.)

2. THAT the Chuka Town Centenary Celebrations Committee converted itself into Chuka Igamba Ng'ombe Development Association (CIDA) vide minute MIN.131/4Cs/2014 of the meeting held on 12th June, 2014 of the Chuka Town Centenary Celebrations Committee, annexure marked "CIDA 1 (F).

3. THAT the purpose for erecting the said monument was, and still is, to mark and commemorate 100 years of existence of Chuka Town.

4. THAT any interference with the monument as initially conceived and erected and the grounds upon which it is erected will fundamentally affect, distort, devalue and misrepresent the essence and purpose for which it was erected thereby occasioning prejudice, irreparable suffering, loss and/or damages against the applicant/plaintiff and the general public at large.

5. THAT the County Government of Tharaka Nithi has without caring to undertake any of requisite public participation as provided for under the law embarked on suspicious acts of redesigning, remodeling, defacing, disfiguring and/or tampering with the said monument, thereby causing the structure to lose it's core value, purpose and essence for which it was conceived, erected and maintained. This structure was conceived and intended to be perpetual.

6. THAT although the parties had held a meeting under the mediation of the Tharaka Nithi County Commissioner whereby the Defendant undertook to cease any further actions/work on the structure, the defendants have refused, failed and/or neglected to honor their words and have been continuing works at the site at night against the interests of the Applicant.

7. THAT the Defendant has been acting arbitrarily with sheer arrogance and impunity.

8. THAT the grounds on which the monument is constructed are for public utility and the applicant has undertaken immense environment upgrading through routine maintenance and conservation which the defendants have been destroying through dumping and escalated wasteful stone use.

9. THA any untoward interference with the structure fundamentally affects and changes the purpose for which the structure was erected and maintained.

4. The application is **supported by the affidavit of GITARI KEA** which states:-

I, GITARI KEA, an adult male of sound mind, aresident of Chuka within Tharaka Nithi County do make oath and state as follows:-

1. THAT I am a member of the Applicant/Plaintiff herein with the knowledge of the facts hereof and therefore competent to make and swear this affidavit.
2. THAT I have the authority of the other members of the Applicant to make and execute documents in respect of this matter on their behalf and that of mine. (See attached)
3. THAT the Centenary Celebrations Monument at Chuka town was initiated and erected by the Chuka Igamba Ng'ombe Development Association courtesy of/vidē the Chuka Town Centenary Celebrations Committee. (Annexed hereto and marked "CIDA 1 (A), (B), (C), (D), (E) & (F) are copies of minutes for meetings for initiation and implementation of the plans for the erection/construction of the said monument.)
4. THAT the Chuka Town Centenary Celebrations Committee converted itself into Chuka Igamba Ng'ombe Development Association (CIDA) vide minute MIN.131/4Cs/2014 of the meeting held on 12th June, 2014 of the Chuka Town Centenary Celebrations Committee, annexure marked "CIDA 1 (F).
5. THAT the purpose for erecting the said monument was, and still is, to mark and commemorate 100 years of existence of Chuka Town.
6. THAT our Association together with other stakeholders and well wishers conceived the erection of the Chuka Centenary Celebrations Monument, mobilized resources and oversaw construction of the said monument.
7. THAT the said monument was unveiled by HE the President, Uhuru Kenyatta during an event to mark and commemorate 100 years of Chuka town's existence.
8. THAT our Association has undertaken, and has been undertaking vast ecological and environmental development, upgrading, maintenance and sustenance of the grounds around which and upon which the structure is erected.
9. THAT the defendant has heinously, with no justifiable cause, reason or excuse and with impunity been interfering with the monument which acts are disfiguring, defacing and/or destroying the said structure thereby fundamentally affecting the essence for which the structure was conceived and erected. (Annexed hereto and marked "CIDA 2" are photographs of the said monument indicating how the structure was initially and how it appears after the said interference.)
10. THAT the acts of the defendant are heinous, arbitrary and driven by nothing but sheer malice, contempt, arrogance and impunity.
11. THAT it is only fair that the purpose for which the structure was conceived and erected be preserved and protected by an order of this Honorable Court.
12. THAT the applicant and other stakeholders have invested heavily on the structure and the environment thereof.
13. THAT I swear this affidavit in support of the application herein.
14. THAT what is deponed hereto is true to the best of my knowledge, belief and understanding.

5. At the exparte stage, the plaintiff's advocate urged the court to grant prayers 1, 2 and 3. He told the court that despite a commitment by one Njue Njagi, the County Executive member for Lands, Environment, Physical Planning and Urban development, during a meeting of the parties at the County Commissioner's Office on 17th July, 2019, that the impugned construction would cease

pending a possible resolution of apposite issues, the defendant had during the nights of 19th, 20th and 21st of July, 2019 embarked on a hurried construction of the same. He told the court that unless the sought orders are granted, this suit would be rendered nugatory.

6. Upon consideration of the application at this *ex parte* stage, the following orders are issued:-

1. Matter **is NOT certified** urgent but is to be heard on priority basis.
2. Prayer 2 is granted pending hearing and determination of this application in terms of Section 63(e) of the Civil Procedure Act in view of the fact that the court goes on recess next week.
3. The plaintiff is ordered to serve the application and the orders issued herein within 2 days of today.
4. The parties will come to court for hearing of this application and/or other directions on 30th July, 2019.

Delivered in open court at Chuka this **23rd day of July, 2019** in the presence of:

CA: Ndegwa

Kirimi Muturi for the plaintiff

P.M. NJOROGE

JUDGE

2. When the application was slated for hearing on **30th July, 2019**, it was reported that the defendant had filed a Preliminary Objection which reads as follows:

NOTICE OF PRELIMINARY OBJECTION

TAKE NOTICE THAT the respondent will raise objection in opposition to the plaintiff's application dated 23.7.2019 on the following grounds:-

1. The application has been brought by an unincorporated body with no legal personality to sue or be sued in its own name (no locus standi).
2. The persons giving the plaintiff/applicant authority to plead likewise have no capacity for the reasons that they were members of Chuka Centenary Celebrations Committee (4C's) NOT Chuka Igamba Ng'ombe Development Association, as sworn in paragraph 4 of the Supporting Affidavit Min. 131/4Cs/2014 of the meeting held on 12th June, 2014 of the Chuka Town Celebrations Committee, annexure marked "CIDA 1 (F).
3. There all (sic) annexures related to the minutes of Chuka Centenary Celebrations Committee (4 C's) and not the plaintiff/applicant.
4. The application and the entire suit is therefore fatally defective, without merit, and a gross abuse of the court process and should be dismissed with costs.

DATED AT NYERI THIS 29TH DAY OF JULY, 2019

3. The plaintiff's advocate asked for time to peruse the Preliminary Objection and to respond to it. The advocate for the objector asked the court to have the matter heard expeditiously as there was in existence

an injunction stopping the construction of the impugned structure.

4. Upon consideration of all pertinent issues, it is ordered as follows:

1. The Plaintiff is granted 14 days to respond to the Preliminary Objection, if it finds it necessary.
2. The Defendant is granted 14 days to file and serve written submissions concerning the Preliminary Objection.
3. The plaintiff is granted 14 days after receipt of the defendant's written submissions to file and serve written submissions.
4. Parties will come to court to take directions on **4th September, 2019**

Delivered in open Court at Chuka this 30th day of July, 2019 in the presence of:

CA: Ndegwa

Kirimi Muturi for the plaintiff

G. K. Kibira for the defendant

P. M. NJOROGE,

JUDGE.