



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC NO. 27 (OS) OF 2019

PATRICK MUGAMBI THAMBU.....1ST APPLICANT

JOHN THURANIRA MICHAEL.....2ND APPLICANT

JULIUS BUNDI KARITHI.....3RD APPLICANT

GEOFFREY MICHUBU.....4TH APPLICANT

JACKSON KIMATHI.....5TH APPLICANT

VERSUS

ATTORNEY GENERAL..... 1ST RESPONDENT

DLASO (Demarcation Land Adjudication/Surveyor Officer) 2ND RESPONDENT

LAND ADJUDICATION OFFICER3RD RESPONDENT

REM MUTABARI JULIUS.....4TH RESPONDENT

RULING

1. The plaintiffs filed this suit vide an Originating summons on 30.5.2019 claiming inter alia that they were unlawfully evicted from their ancestral land. Thereafter on 2.8.2019, the plaintiffs filed an application seeking an order to restrain the 4th respondent from carrying out acts of destruction on the suit parcels namely no. 2318, 2305, 2661, 2393 and 2313 at Githu Adjudication section and that the OCS Mikinduri police station be compelled to implement the orders sought herein. The application was scheduled for inter-partes hearing on 14.10.2019.

2. Come 14.10.2019 and Ms. Aketch, counsel for the 4th respondent made an oral application to have the supplementary affidavit of John Thurania Michael sworn on 7th October 2019 expunged from the record as it is scandalous. This application by Ms. Aketch is what has triggered the present ruling.

3. In the said affidavit of John Thurania sworn on 7.10.2019, he has deponed that their application for inhibition to restrain the 4th respondent from damaging any developments on the suit parcels was transferred to Chuka High Court secretly without notice of hearing served by the court or the advocates of the 4th respondent herein on 7/08/2019. He alleged that the transfer was motivated by malice and conspiracy of the 4th respondent's advocate to help defraud them of their ancestral home as she cheated the court that they had no reason of failing to attend. He further stated that the conduct of the advocate for the 4th respondent amounted to a breach of advocates professional code of conduct and ethics. They also sought to have the court set aside the order of 7/08/2019 issued at Chuka court.

4. Ms. Aketch argued that they were served by a process server with a hearing notice that the suit was to be heard on 6/08/2019. The court was however not sitting on that date so she went to the registry to take another date. She was then informed that the file was not in Meru on 6/08/2019 as it had a certificate of urgency which was to be heard in Chuka on 7/08/2019. She therefore went to Chuka on 7/08/2019 and she did not find the applicants. She had filed a replying affidavit and Judge Njoroge of Chuka gave directions that the application be heard on 18/09/2019 at Meru ELC. She further stated that no order was issued by the Chuka court so there is no order to be set aside. M/S Aketch contends that the affidavit is insinuating that she committed an offence of which she did not.

5. Geoffrey Michubu, the 4th plaintiff/applicant is the one who orally responded to the application by Ms. Aketch. He reiterated what they stated in their affidavits. He added that on 06/08/2019 they went to the registry and were informed that the files under certificate were taken to Chuka. They were not able to go to Chuka and when they later got the proceedings they found that the Judge at Chuka Court had declined to hear their application because of their absence and that the advocate of the 4th respondent got a walk over on their account.

6. The issue for determination is ***whether the supplementary affidavit of John Thurania Michael sworn on 7th October 2019 should be expunged from the record.***

7. A perusal of the record shows that on 21/06/2019 the registry at the behest of John Thurania, the 2nd plaintiff fixed the matter for directions on 6/08/2019 before the Deputy Registrar of this court. Thereafter, the applicants filed an application on 2/08/2019 under a certificate of urgency. This application was filed during the court vacation period.

8. **Section 10 of the High Court (Organization and Administration) Act** provides that;

“The Court shall subject to subsections (2), (3) and (9) sit continuously for the trial of criminal cases and disposal of civil and other legal business of the Court. (2) Without prejudice to the generality of subsection (1), the sittings of the Court shall be— (a) from the 14th January to the second Wednesday before Good Friday; (b) from the Wednesday after Easter to the 31st of July; and (c) from the 16th September to the 20th December. (3) There shall be recess sessions falling during the intervals between the sitting sessions referred to in subsection (2)”.

9. During the recess period, matters which are certified urgent are heard by the Judge on duty. See **Section 17 of the High Court (organization and Administration) rules.**

10. As far as Meru ELC Court is concerned, **a notice dated 17th July 2019** was published signed by the Deputy Registrar Meru Law Courts addressed to all advocates and litigants showing the judge’s recess duty roster. This notice was placed where all notices are hanged which is a public place and visible to all. The notice clearly indicated that the duty Judge for the period 1/08/2019 to 9/08/2019 in the Environment and Land Court at Meru would be Justice P. M. Njoroge of Chuka ELC. The applicants had filed an urgent application on 2.8.2019 which was the recess period and that is why the file was placed before Judge Njoroge of Chuka ELC.

11. I therefore do not see at what point the advocate committed an offence or breached the advocates’ professional code of conduct and ethics as alleged in the affidavit of John Thurania. The allegation by this deponent that the file was secretly taken to Chuka court, that the counsel, Ms. Aketch cheated the court and that she should be cited for breach of advocate professional code of conduct and ethics is scandalous and unwarranted. Accordingly, I find that the affidavit of John Thurania is defamatory.

12. Secondly, the applicants seeks that the orders issued on 7/08/2019 be set aside. The proceedings which the applicants admit they applied for and were given clearly indicates that **NO ORDERS** were issued at Chuka ELC by Judge Njoroge. The Judge only directed that the matter be heard before this court on 18.9.2019. The application is still pending. The allegation that the application has been heard is unfounded. Indeed on 18.9.2019 when the matter came up before me, Geoffrey, the 4th plaintiff had sought for more time precisely one week in order to effect service upon the Attorney General.

13. I also note that the applicants are filing documents haphazardly without leave of the court. When this matter came before me on 18.9.2019, the applicants did not indicate any intention to file any further affidavits, yet John Thurania went ahead to file a document termed as a Replying Affidavit sworn and filed on 2.10. 2019 and another, the supplementary Affidavit sworn and filed on 7.10.2019.

14. All in all, I find that the oral application made by Ms. Aketch is meritorious. In the circumstances, the Replying affidavit of John Thurania Michael sworn on 7th October 2019 is hereby expunged from the record forthwith. The other affidavit of John Thurania filed on 2.10.2019 without leave of the court is also expunged from the record.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 10TH DAY OF DECEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Aketch for 4th respondent

2nd applicant

4th applicant

5th applicant

HON. LUCY. N. MBUGUA

ELC

JUDGE